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THE PRESS and the Constitution

antee of freedom of the press affects the lives of a wide range of individuals — from publishers to pickets, from Big Business leaders

THE PRESS and the Constitution

1931–1947

by

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PREFACE

THE Constitution says that Congress shall pass no law abridging freedom of the press, but when basic rights come into conflict there has to be a reconciliation. Moreover, the press is ubiquitous and laws passed for general purposes inevitably affect it. The problem for the courts is then one of working out adjustments between two or more equal constitutional grants of privilege.

An important part of the activity of the press has to do with criticism of government, and this criticism touches individual administrators, legislators, and judges of all varieties of temperament. Constitutional law is made when some of these officials seek legal checks on the press, when they attempt reprisals for wrongs fancied or real, or when the press resists an effort to limit its independence.

In a period of popular unrest and unusual governmental activity, such as 1931–47, the press feels intensely the effects of general as well as of direct legislation. The purpose of this study is to examine the development of the concept of freedom of the press on the level of constitutional law during the period beginning with the Minnesota gag law case and ending with revision of the Wagner Act in 1947.

I have been fortunate in having the encouragement of many persons in undertaking this study, and I am especially grateful to Professors Henry Rottschaefer, E. M. Kirkpatrick, William Anderson, Ralph O. Nafziger, and Ralph D. Casey of the University of Minnesota, and to Professors Lee-Carl Overstreet and R. L. Howard, and Percy A. Hogan, law librarian of the University of Missouri.

The gathering of facts and the interpretation of them are wholly my own, and those who helped me with problems within and without the discipline of the journalist are not to be charged either with my errors or my point of view.

J. EDWARD GERALD

Minneapolis, September 1947

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CHAPTER I

The Pattern of Freedom

THE SPIRIT OF REFORM

WIDESPREAD individual suffering caused by the depression of the 1930's drove many persons from the carnivals of trade to the temples of the mind in quest of patterns of social and economic justice.

They found there, for use during the ensuing season of contemplation, those two ancient philosophies, freedom by individual volition and freedom by group volition. As applied in the American system the two philosophies have always been intermingled, and one political period varies from another partly with the shift in emphasis. In the period here to be examined the emphasis was upon a positive program of reform through group action, utilizing the powers of government to intervene in economic affairs for the welfare of the individual as defined by law.

On the political level the forces of social protest worked themselves out in part through the national administration of President Franklin D. Roosevelt. Legislative emphasis upon opportunity for the lesser individual was accompanied by renewed judicial concern for man as man—a point of view which had fallen into neglect during a period when the nation was fascinated by its business achievements. Whatever its result may have been, the avowed purpose of much of the reform was the creation of government guardianship for those deemed to be weak, so that they could obtain larger economic benefits from those deemed to be strong.

The events dating from the United States Supreme Court decision in the Minnesota gag law case in 1931 to the repeal and restatement of the Wagner Act in 1947 affected the press deeply on two levels of its existence.

On the first and basic level, its relations with the public, the press found itself the prize of contending forces of traditionalism and reform. Both forces sought to use the press in achieving social and political objectives and the press, being more neutral than the antagonists desired, came in for long and bitter criticism.

The leaders of the national administration in Washington, like most men driven by singleness of purpose, soon came to regard the press as standing in the way of a great crusade. President Roosevelt frequently stated that journalists wrote things they did not believe in order to please a reactionary ownership. Labor newspapers used smear tactics against the "capitalistic press," a press largely written and edited by brother unionists in the American Newspaper Guild. At the same time the reporters were being assailed by their employers on the theory that trade unionism prevented writers from being unbiased in their handling of the news.

A whole new medium of news communication, the radio, came during the period under examination to share with the press the burdens both of informing the public and of being criticized for its methods; but, regardless of competition and criticism, the aggregate circulations of the daily newspapers (exclusive of Sunday editions) rose from about forty million to more than fifty-one million a day.

On the second level, its legal and constitutional rights, the press was affected by the reform program wherever as a business it was touched by the labor relations, social security tax, and wage and hour laws. Issues on this level reached the courts and were heard and decided in the climate of public and official opinion about the press created by events on the first level. No one can say for certain how much the decisions on legal issues were affected by the reform movement, but the realities should be kept in mind in reading the court cases of the time.

Such a situation provokes controversial handling of great words such as "liberty" and "freedom," but, beyond controversy, it appears that during the period there has been a net gain to genuine human freedom which is of considerable consequence and continuing importance. This gain was possible because the legal ground had been prepared for it by Justice Oliver Wendell Holmes, Justice Louis Dembitz Brandeis, and others, and because a long line of liberal thinkers on the United States Supreme Court was determined to apply the guarantees of the First Amendment against the states through the due process clause of the Fourteenth Amendment.

The legal procedures for enforcing the guarantees of freedom of the press had completed a swing of the pendulum from the Kentucky and Virginia Resolutions of 1798 when Chief Justice Hughes read the opinion of the court in the Minnesota case. Where Jefferson and Madison had assailed a federal government completely reactionary in its control of the press and had upheld the states as foun-

tains of better justice, Hughes took the very amendment which the Federalists disregarded and turned it against reaction in regulation of the press by state governments.

It is cold comfort for freedom that, as a fugitive from local law and popular consent, she has to be rescued from mistreatment by the power of a central and distant government. And even the strength of her new sanctuary is in doubt when it appears that a Constitution created by a free people has to be turned against them to keep open the avenues of expression by which democratic government operates.

This, however, is the substance of the constitutional history of freedom of the press from 1931 to 1947, for during this time the court decisions which have greatest importance to freedom are those seeking to open or to keep open the channels of communication. The cases specifically applying to freedom of the press have been selected and studied here so that, thus limited, the principles may be discussed not only in relation to the bare bones of the law, but also to the rounder and more significant contours of modern political theory as expressed by our highest courts.

Freedom of speech and press are the same, involving the same legal principles and the same public interests; the purpose here, however, is to emphasize the rights of the printed page, and its various bearers, before the law. Some of these bearers, particularly newspaper publishers, have appeared confused as to the real nature of their rights and have regarded themselves as harmed by some of the trends in the law which have developed in this critical period.

The authors of the First Amendment seem to have been satisfied to protect freedom merely by restraining government. When federal restraint of individuals was introduced into the law of civil rights at the end of the Civil War, the Supreme Court refused to apply so revolutionary a concept to the fullest, and contented itself with a formula applied only to official acts which would make government policy fairly uniform under federal control.[1]

But James Lawrence Fly, a modern and sometimes controversial figure in the field of freedom of communications, has stated the desirable guarantees of freedom of speech today in terms which emphasize group values as well as individual liberty:

(1) Free access to all pertinent news sources; (2) ways and means for the ready and adequate collection and distribution of news; (3) full pres-

[1] *Civil Rights Cases*, 109 U.S. 3 (1883). In later days, *Powe* v. *United States*, 109 F. 2d 147 (1940); and *McIntyre* v. *Penn Broadcasting Co.*, 151 F. 2d 597, 66 S. Ct. 530 (1946).

entation of fact and opinion; (4) presentation of opposing points of view and argument; (5) the absence of bias, prejudice, suppression, or distortion; (6) the absence of bottlenecks, overconcentration of control, or domination by a few special interests, especially where the pipe lines to the market place of thought are limited in number; (7) the presence of diversity in the control of news sources and of mechanisms for news distribution to the public.[2]

The cases of the period utilize the purely hands-off principles of the founding fathers along with some of the new normative objectives stated in the foregoing quotation. The positive and the negative guardianship of freedom had already been given mixed expression in such legislation as the Sherman and Clayton acts. But in our day the sharpest phases of the controversy over assuring freedom have been developed by government intervention in private affairs, on the theory that freedom is not a passive force but must be socially directed to carry out the principles of the First and Fourteenth amendments.

THE ISSUES IN THE COURTS

The outstanding legal opinions of the period may be classified into the fields of contempt, picketing, the newspapers and social security legislation, taxation and regulation of the press, restraint of trade as practiced by the Associated Press, and censorship through licensing of distribution. In some of these fields the activity has been great; in others little has occurred to change the established patterns. But if the events in contempt, restraint of trade, and censorship by license were alone to be studied, the period would contain some of our most brilliant pages of political philosophy and constitutional law.

Chafee says that the meaning of freedom of speech as worked out in America seems to be this:

One of the most important purposes of society and government is the discovery and spread of truth on subjects of vital concern. This is possible only through absolutely unlimited discussion, for, as Bagehot points out, once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all natural advantages in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but

[2]James Lawrence Fly, "Freedom of Speech and Press," *Safeguarding Civil Liberty Today* (Ithaca: Cornell University Press, 1945), p. 63.

freedom of speech ought to weigh very heavily in the scale. The First Amendment gives binding force to this principle of political wisdom.[3]

Use of the Contempt Power

One of the most delicate tests of all comes when the courts have to weigh their own integrity against the rights of others as expressed in the Constitution. Such an occasion arises when a newspaper criticizes a court and is required to answer charges of interference with the processes of justice. A major change in policy on the part of the courts has been achieved by several related developments.

After several years of evident indecision, the United States Supreme Court decided in 1925 that the sanctions of the First Amendment should be applied against the states by means of the Fourteenth Amendment. This general principle was applied specifically to the newspapers in 1931, and at the same time the long-standing custom of presuming the acts of state legislatures to be valid was dropped in matters relating directly to basic freedoms.

A third principle combined with these developments to effect drastic revision of the rule on constructive contempts by publication. This was the clear and present danger test, developed over a period of forty years and finally expressed by Justice Holmes in his dissenting opinion in the *Abrams* case in 1919. This test was used instead of the older bad tendency test, one in ill favor with lovers of liberty because of its association with sedition and public libel prosecutions in England and its ready service in securing convictions where fine lines had to be drawn to fit a reactionary point of view.[4]

As the Supreme Court worked out the handling of constructive contempt, free public discussion—the major object of the First Amendment—was allowed to prevail until there existed a clear and present danger of very serious injury to the state. And judges were told not to draw the line too soon. The danger had to be real and the degree of imminence extreme. The judge should not be driven by lack of fortitude, when faced with criticism, to act in defense of his court long before, to a detached mind, any real peril existed.

[3]Zechariah Chafee, Jr., *Free Speech in the United States* (Cambridge: Harvard University Press, 1942), p. 31.

[4]John Raeburn Green says that Justice Holmes developed this measure of essential public safety over forty years of judicial experience. He thinks it grew out of a test for the "degree of proximity to the completed crime required for a common law attempt." See his "Liberty Under the Fourteenth Amendment," *Washington University Law Quarterly*, Vol. 27, No. 4 (Summer 1942), pp. 497, 539. Professor Robert E. Cushman shows that both devices are still in use by the court and that Holmes' test is used only in evaluating acts or act-words, while the tendency gauge is applied to language considered objectionable or dangerous. See his "Some Constitutional Problems of Civil Liberty," *Boston University Law Review*, Vol. 23, No. 3 (June 1943), p. 335.

Justice Black wrote the most important decision in the series which altered the handling of constructive contempt cases. This was *Bridges* v. *California,* a distinguished opinion deserving a place in the literature of political liberty. It brought the courts, after a detour deep into an area of largely fictitious inherent powers, back into line with the early American popular conception of the contempt process. And it sought to evoke from the public, through its interpretation of the precise allocation of power the people had made to government, appreciation for an administration that shunned coercion. In so proceeding, it assumed this step to be the one best calculated to obtain voluntary obedience to law and toleration of restraint.

Picketing as Freedom of Speech

The act of picketing—carrying a lawful sign in the vicinity of a firm important in some way in a labor dispute—has been advanced in the period under examination from the status of a prima facie tort to an act of free speech. As tort, picketing was commonly enjoined unless legal justification could be proved, and the picket took the burden of proof. Now, however, picketing has been given constitutional protection, with the burden of proof placed upon the complaining party, and the clear and present danger test has been applied to any restriction through either state common law or legislative action. The dividing line between lawful and unlawful picketing has been fixed within a rather narrow range in which violence becomes the first justification of limitation. Other restraints approved by the United States Supreme Court have confined picketing to areas of interdependent economic interests as defined by state statute approved by state courts.

The aspect of violence associated with picketing was made ambiguous by a court opinion which permitted acts of violence far in the background to justify an order curbing present peaceful picketing. And wide areas of new litigation were opened in 1947 by the Taft-Hartley law, which replaced the Wagner Act.

The net gain in the developments has been in the provision of quick resort to the federal courts under the First and Fourteenth amendments. This procedure has checked extreme restrictions of picketing under color of state law.

Free Speech for Employers

While employees were demanding greater protection for picketing, employers were subjected to rulings of the National Labor

Relations Board which tended to curtail rights of free speech, on the theory that when an employer spoke to his workers his power over them gave words of admonition and advice the character of threat and coercion. A fairly clear policy outlined by the court indicates that words not threatening on their face should not be disturbed, but that a background of non-observance of the act may in proper cases be read into the context of speech, which may then be the basis of punitive action by the administrative board. An employer's discussion may sharply criticize a union and still avoid censure provided it is quite clear that no threats or intimidation are present. The court opinions in this respect were incorporated into the Taft-Hartley Act [Section 8 (c)].

Newspapers and Social Security Legislation

The newspaper is both a business and a communications agency protected by the First and Fourteenth amendments. At least, the legal departments of government have so held consistently, though many newspapers and their trade organizations have not accepted the full import of the government contention.

When the National Labor Relations Act was passed in 1935, the newspapers, with other interstate business enterprises, were asked voluntarily to join a government program in which approved trade practices, or codes, were to have the effect of law. Recalcitrant firms were to be licensed by the president and were to be subject to penalties for further non-compliance. The newspapers demanded and received from a reluctant government exemption from the licensing provisions. The mutual suspicions which grew up between the newspapers and government during the contest were prolonged into phases of the social security and public welfare programs which touched the press.

When the National Labor Relations Act was passed in 1935, the newspapers were among the first businesses to test it in court. This act, creating a national tribunal to protect the workers in their organization of unions, was described by newspaper spokesmen as violating the First Amendment when applied to the press. On the day the court held the act to apply generally to interstate business, it was held valid when applied to the Associated Press, an agency of the newspapers. The same constitutional objection was posed, perhaps by a minority of the publishers, but, at any rate, through the American Newspaper Publishers Association, to the Fair Labor Standards Act of 1938. The court subjected newspapers to that law

without significant reservation. Freedom of the press was held to be liberty to print when, where, and what a newspaper owner liked, without prior restraint, so long as his plant force was covered properly by the act.

The newspaper business deals with many unions, but the collective bargaining movement of particular importance here was among editorial employees and office workers who often were represented by the same union. The freedom of the press issue was raised against orders of the national War Labor Board granting contracts with maintenance of membership clauses, also without success.

The publishers opposed, as a group, contracts with unions of editorial workers and particularly objected to union shop contracts. They argued that if an employee had to give first loyalty to his union the employer had lost control of the news staff of his paper. The issue was not settled by the court decisions which gave editorial unions the protection of the National Labor Relations Act, for the publishers continued to oppose union contract demands, as they are free to do. A case in which an editorial department employee has been discharged for proved bias in news writing has not yet reached the courts.

The federal power here operates along the path of the commerce clause, and even small daily newspapers, with only one half of 1 per cent of their circulation crossing state lines, have been held in interstate commerce and subjected to federal regulation of their employment policies. Justice Murphy, however, has objected that he did not believe such regulation was intended by Congress. His objection no doubt will be given new vitality when the courts come to construe Section 10(a) of the Taft-Hartley Act limiting NLRB jurisdiction, at least, over "predominantly local" business, even if in commerce. What happens here will likely be extended, in time, to the Wage and Hour administrator, too.

Regulation of the Press by Taxation

While newspapers have been denied any immunity from regulation under general law, punitive taxes directed at them have been held to violate freedom of the press. A state law passed at the behest of the Louisiana political boss, Huey P. Long, applied a tax of 2 per cent on the gross income of newspapers with a circulation of 20,000 or more. The papers affected were enemies of the political regime. The Supreme Court, in an opinion labeling the tax as one on knowledge and one destructive of circulation, killed it.

State sales taxes as applied to newspapers have been upheld by both state and federal supreme courts, though religious pamphleteers have been exempted under the First Amendment. A city license tax on newspapers scaled by size of circulation was held invalid by the supreme court of Florida on the strength of the rule in the Louisiana case.

Direct Government Intervention

The dilemma which chills the ardor of those who think the press should be required to change in some way is whether the job shall be left to individual editorial virtue or to the social conscience of the group expressed in mandatory law. In either case the means appear inadequate for the task. Individual control, ideal under the theory of democratic government effected through Bentham's formula of instruction, excitation, and correspondence, tends to bog down in complacency, thus converting a great social instrument into a mere personal property.

Government control, which has prevailed for practically all of recorded history, tends to make the press either an inert, colorless government circular or an instrument of propaganda by which the group in power seeks to maintain political control. A contribution of American and English democracy to the science of government has been to separate most agencies of communication from official direction by the government and to place them in private hands for the greater health of the people's sovereignty.

As long as the general temper of society matches the ordinary complacency of the press, the Anglo-American system works well. But when important elements of society are hurt by the state of affairs prevailing, they look to the press as an agency of the democratic spirit for assistance in pressing programs of reform. This is a critical point in the relations between the press and democratic society, for the achievement of physical size sufficient to make the press widely useful is, in a free society, tantamount to making it part and parcel of the group benefiting most from established patterns. Then the press as such feels the sting of social criticism, and government intervention to make it more responsive is openly advocated. And some critics, often those most vocal, are not wise enough to realize that government by its very nature is an unfit guardian of the welfare of its chief critic. Fly, an ardent advocate of limited government intervention while chairman of the Federal Communications Commission, warns:

. . . I doubt that we can ever afford to rely upon the beneficent exercise of extremely great power. Democracy cannot rest upon so slender a reed, for the relation of great economic power to communications of any type tends inevitably to exercise some degree of influence, no matter how slight, over news and opinion.[5]

The problems of government intervention are not by any means confined to the press. Professor C. Herman Pritchett of the University of Chicago, who has studied the division of the Supreme Court with reference to social and economic issues, says the numerous dissents result because the court is

engaged in a basic controversy as to the allowable extent of public controls versus private rights. This issue is a fundamental one for American society and it is on the whole a healthy sign to have members of the Supreme Court from their individual viewpoints debating it in deadly earnest.[6]

Likewise, far from being unnatural and perhaps even sinister, as sometimes asserted, it is a healthy sign that the people debated attitudes toward the press. It was part of the spirit of the times. It may be, as some competent observers declare, that the Bill of Rights contains no hint of economic democracy or any admonition to the state to conduct an active and socially responsible campaign to secure the economic freedom of the individual.[7] But other competent observers show that constitutions grow out of the travail of the people, and that the forces which create them are not likely to heed artificial barriers to the growth of economic democracy any more than the many now-forgotten obstacles which cluttered the way to political democracy.[8]

The limited government intervention proposed by Fly, Morris Ernst, and kindred spirits aims to maintain a diversity of agencies which disseminate information and opinion. The action allowed by the courts in this controversial arena seems narrowly confined to checking only one aspect, perhaps a minor one, of the growth of monopolistic factors in the field of press and radio communications.[9]

This was the result when the government sued the Associated Press under the antitrust laws and secured an amendment of the

[5]Fly, *Freedom of Speech and Press*, p. 69.

[6]C. Herman Pritchett, "The Divided Supreme Court, 1944–1945," *Michigan Law Review*, Vol. 44, No. 3 (December 1945), p. 427.

[7]See Kenneth C. Cole, "Some Observations on the Significance of the American Bill of Rights," *Washington Law Review and State Bar Journal*, Vol. 18, No. 2 (April 1943), pp. 90, 96–97.

[8]A. J. Carlyle, *Political Liberty* (Oxford: Clarendon Press, 1941), *passim*, and Chap. IX, p. 197.

[9]See Chapter VI.

bylaws opening membership to papers like the Chicago *Sun* and the St. Louis *Star-Times* which, as competitors of long-established AP members, had been unable to obtain AP service.

This is the single instance of affirmative government intervention designed for greater economic freedom of the press, but Ernst advocates others. He says:

> The owners of press, radio and movies favor inaction on the part of government because by inaction those in the saddle can further act to control the market place. Hence, inaction deprives the public of its right to hear, see, and read. We need governmental offense as well as defense in the pursuit of liberty. The battle involves a way of life and not just named individuals.[10]

Kent Cooper, executive director of the AP, said after the government intervention became effective that

> no attempt so far has been made by the government through the courts or by the courts to assert editorial power over the news the Associated Press delivers in spite of its successful legal intervention in its affairs.[11]

Ernst prophesies that the total number of daily newspapers in the United States, down about one fourth from an instable high point in 1909, would be further reduced by one half—down to about one thousand daily papers, perhaps—before the industrial revolution runs its course.[12] If he should be correct in his prediction of trends, pressure for new government intervention to maintain diversity in the market place of thought[13] will be maintained. At any rate, the 1931–47 period saw the beginning of a momentous experiment by which government tampered with the economic structure of the press to obtain social ends. Only great wisdom and restraint on the part of government, working against the dogged resistance of those men of practical affairs who believe the government to be wrong, can produce a synthesis containing the benefits of new adjustments to freedom. According to the warning of history, the risk involved is that the people in the end will have less freedom of press and the government more.

The freedom of press guarantee is an American device, young among the civil rights nurtured in England. Dean Pound explains that Coke did not include it in his *Institutes* because it was not a common-law problem but one handled by the administrative court

[10]Morris L. Ernst, *The First Freedom* (New York: Macmillan, 1946), pp. 50–51.

[11]Kent Cooper, "AP Put Under Court Control by Demand of FDR—Cooper," *Editor & Publisher*, Vol. 78, No. 43 (October 20, 1945), p. 11.

[12]Ernst, *First Freedom*, p. 62.

[13]This phrase belongs to Justice Holmes. See Chapter VI.

of the Star Chamber, where any criticism of government could be promptly and arbitrarily dealt with.[14] The popular feeling that the press should be given wide leeway in the criticism of government grew in the colonies partly because the ultimate authority was a distant one and its local representatives were severely restrained by local feeling and local juries. At any rate, the Virginia Bill of Rights seems to have been the first charter which gave protection to the press;[15] thus the guarantee was born with the Declaration of Independence and has not been tested in the long perspective of history.

The very youth of the guarantee has been reflected in the narrow and arid interpretation given it by the American judges who, while living in a land of liberty under a revolutionary government, lacked the vision to give the Bill of Rights native interpretation and depended upon Blackstone, a Tory and the author of the legal best-seller of his day, to measure out the vitality and spirit permitted this device of democratic government.

As a consequence, the spirit of the Virginia Bill of Rights,[16] which would have allowed the growth of law indigenous to America, was confined to the realm of good intentions. The constitutions of Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, and South Carolina at first contained unrestricted guarantees like that of Virginia. Federalist judges, the pervasive influence of Blackstone and Story,[17] and finally the authoritarianism of the Civil War erased most tendencies of native liberalism both from the charters and from the court interpretations of the states of the New World.[18]

As for the federal Constitution, the records show that such a narrow government was envisaged by the Convention that it was deemed unnecessary at the time to limit its powers with reference to the press.[19] The guarantees of the first ten amendments had to be

[14]Roscoe Pound, "The Development of Constitutional Guarantees of Liberty," *Notre Dame Lawyer*, Vol. 20, No. 4 (June 1945), pp. 347, 356.

[15]*Ibid.*, p. 356.

[16]". . . the freedom of the press is one of the great bulwarks of liberty and can never be restrained but by despotic governments." F. N. Thorpe, *The Federal and State Constitutions* (Washington: Government Printing Office, 1909), Vol. VII, p. 3814.

[17]Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Little, Brown, 1858), Vol. II, pp. 667–69.

[18]The standard English phrase linking the American guarantees with mere exemption from prior censorship, and admitting truth as a defense in libel suits when "published for good motives and justifiable ends," appeared in the constitutions of many southern states for the first time during the Reconstruction era. Data from Thorpe, *Federal and State Constitutions*.

[19]Max Farrand, *Records of the Federal Convention* (New Haven: Yale University Press, 1911), Vol. III, pp. 286, 290, 511, 588, 637, 640.

promised in the end, however, for ratification of the original document.

This stolid, cautious treatment of the substance of freedom moved Thomas M. Cooley to say in 1878:

> The railway has become the successor of the king's highway, and the plastic rules of the common law have accommodated themselves to the new condition of things; but the changes accomplished by the public press seem to have passed unnoticed in the law, and, save only where modifications have been made by constitution or statute, the publisher of the daily newspaper occupies today the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privileges and no more protection.[20]

If this be the pace at which freedom of the press has advanced in America, the criticism of monopoly in the field of communications and its motivation of government intervention seem unlikely to get results at a rate which will seriously threaten traditions in the near future.

Censorship through Licensing

Licensing is applied casually by local units of government to all types of business. Its common application made both officials and the general public careless of the dangers of censorship of literature present in the licensing system, for discretion was usually lodged in the issuing official in one way or another.

The activities of Jehovah's Witnesses, an evangelical group using colporteurs to spread the tidings of their faith, brought to light the censorship possibilities in common licensing statutes and ordinances. Discrimination against the Witnesses was practiced on a wide scale throughout the country in an effort to discourage their work.

The first of the ordinances was a general one forbidding distribution of any kind under any circumstances without a permit issued at the discretion of a city official. The element of discretion, whether by a single official or by a board, and whether or not subject to check by judicial review, was fatal to every such ordinance to come before the courts. Nominal regulatory fees and use of permits issued without discrimination were approved; in the case of fees, however, the element of reasonableness was made a constitutional question, and the burden of proof was on the unit of government.

The Supreme Court of the United States divided sharply over the business or commercial aspects of the practice of religion, a minority

[20] *A Treatise on the Constitutional Limitations* (Boston: Little, Brown, 1878), p. 564.

insisting that any activity of a business nature should be subject to normal license fees and that only acts of worship having the dignity of rites of the church were to be set aside as beyond the power of the state to regulate.

While the literature of religion was being given generous protection through the courts to safeguard its distribution in streets and in homes, advertising matter was repeatedly denied similar protection. It could be treated with all the arbitrariness traditional to state and municipal regulation of nuisances.

Restraints under the Postal Power

Another administration agency to suffer severe restriction of assumed powers amounting to license and censorship of the press was the Post Office Department. The subsidy of publications which existed in the form of a low postal rate had long been held by the courts to confer special power on the postmaster general to classify publications arbitrarily and to bar them from the mail under certain conditions. In some cases where, at least in the opinion of a minority of the court, he might possibly have grounds to bar papers from the mail, he merely changed their classification so as to call for a higher rate of postage.

Finally, in an effort to extend his power along lines marked out by court opinions, the postmaster general changed the classification of a magazine from second to third, adding about $500,000 a year to its postage bill. The ground for action was a claim that the magazine was not rendering sufficient public service to be entitled to the "high privilege" of second-class rates. The court denied that the official had such power and confined him henceforth to classification of the mail solely on the basis of its physical characteristics.

HOW THE JUSTICES VOTED

One other matter is important: Because President Roosevelt attempted in 1937 to expand the Supreme Court membership in the hope of clearing the way for approval of legislation, and because he identified his program with liberalism and the common man, the extent to which his appointees on the court have been responsible for decisions advancing the liberty of speech and the press must be examined.

The justices of the United States Supreme Court during the time of this study, together with the dates of their service, are listed in the following table:

	From	*To*
Oliver Wendell Holmes	Dec. 6, 1902	Jan. 11, 1932
Willis Van Devanter	Jan. 3, 1911	June 1, 1937
James Clark McReynolds	Oct. 12, 1914	Feb. 1, 1941
Louis Dembitz Brandeis	June 5, 1916	Feb. 13, 1939
George Sutherland	Oct. 2, 1922	Jan. 18, 1938
Pierce Butler	Jan. 2, 1923	Nov. 16, 1939
Charles E. Hughes (served a prior term, 1910–16)	Feb. 13, 1930	June 2, 1941
Harlan Fiske Stone	March 2, 1925	April 22, 1946
Owen J. Roberts	June 2, 1930	Oct. 1, 1946
Benjamin N. Cardozo	March 14, 1932	July 9, 1938
Hugo L. Black (appointed by President Roosevelt)	Oct. 4, 1937	
Stanley Reed (appointed by President Roosevelt)	Jan. 31, 1938	
Felix Frankfurter (appointed by President Roosevelt)	Jan. 30, 1939	
William O. Douglas (appointed by President Roosevelt)	April 17, 1939	
Frank Murphy (appointed by President Roosevelt)	Feb. 5, 1940	
James F. Byrnes (appointed by President Roosevelt)	Oct. 6, 1941	Oct. 5, 1942
Robert H. Jackson (appointed by President Roosevelt)	Oct. 6, 1941	
Wiley Rutledge (appointed by President Roosevelt)	Feb. 11, 1943	
Harold H. Burton (appointed by President Truman)	Oct. 1, 1945	
Fred M. Vinson (appointed by President Truman)	Oct. 7, 1946	

As a starting point, let us take *Near* v. *Minnesota,* 283 U.S. 697, June 1, 1931. The court, with the following division, passed essentially on the question of permitting a judge of a Minnesota district court to censor the press:

NO: Hughes, Holmes, Brandeis, Stone, Roberts
YES: Butler, Van Devanter, McReynolds, Sutherland

Although none of Mr. Roosevelt's appointees was involved in this case, the tide of political overturn already was running strongly and had been felt in the Congress. *Near* v. *Minnesota* is, then, a kind of reference point against which to calculate changes.

In the field of constructive contempt, the case of *Nye* v. *United*

States, 313 U.S. 33, April 14, 1941, interpreting the federal contempt statute, foreshadowed the full changes made later on. The issue was restriction of a court's power in cases of contempt to incidents occurring in the presence of the court, and it will be noted that the majority was made up entirely of Roosevelt appointees:

FOR RESTRICTION: Douglas, Black, Reed, Frankfurter, Murphy
AGAINST RESTRICTION: Stone, Hughes, Roberts

In *Bridges* v. *California,* 314 U.S. 252, December 8, 1941, the issue, as already stated, was of a state court's power to reach newspaper critics through summary contempt procedure. Roosevelt appointees wholly made up the majority, but the same group contributed two votes to the dissenting side:

FOR LIMITING THE COURT: Black, Douglas, Reed, Murphy, Jackson
AGAINST LIMITING THE COURT: Frankfurter, Stone, Roberts, Byrnes

There seems no doubt that the influence of the Roosevelt appointees was decisive in this line of development. Without the changes they wrought the *Nye* and *Bridges* cases would have been decided differently. But rarely is that influence so clear-cut or decisive.

The legal establishment of peaceful picketing as an act of freedom of speech and press was prepared when the court contained no Roosevelt appointees. The specific issue was approval of a state statute giving peaceful picketing affirmative protection as a right of free speech and press. The division:

FOR THE PICKET: Brandeis, Hughes, Stone, Roberts, Cardozo
AGAINST THE PICKET: Butler, Van Devanter, McReynolds, Sutherland

In *Hague* v. *CIO,* 307 U.S. 496, June 5, 1939, also concerning public labor policies, the issue was political censorship of labor demonstrators under the police powers. Stone, Hughes, and Reed were flatly against such censorship; Roberts and Black favored preventing censorship of the activity of citizens but wanted a finding that would leave the rights of aliens in doubt; and McReynolds and Butler were flatly in favor of the censorship. Stone, Hughes, and Roberts, of the pre-Roosevelt court, held the balance of power here and used it for advancement of liberty of expression. And when it came to a division over giving peaceful picketing in general the protection of the First and Fourteenth amendments, in the case of *Thornhill* v. *Alabama,* 310 U.S. 88, April 22, 1940, only McReynolds held out against this novel extension of the substantive right, Hughes, Stone, and Roberts joining Murphy, Black, Douglas, Reed, and Frankfurter in the majority.

In *AFL* v. *Swing,* 312 U.S. 321, February 10, 1941, a state sought to limit picketing, after its definition as a substantive right, to disputes between employee and employer. The division was:

AGAINST THE LIMITATION: Frankfurter, Stone, Reed, Murphy, Black, Douglas

FOR THE LIMITATION: Roberts, Hughes

Two Roosevelt appointees went to the other side when a remote background of violence was urged as a justification for enjoining peaceful picketing (*Milk Wagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287, February 10, 1941):

FOR THE INJUNCTION: Frankfurter, Hughes, Murphy, Stone, Roberts

AGAINST THE INJUNCTION: Black, Douglas, Reed

When it came to confining peaceful picketing to a sphere of closely related economic interest, in *Carpenters and Joiners Union* v. *Ritter's Cafe,* 315 U.S. 722, March 30, 1942, the division was:

FOR THE RESTRICTION: Frankfurter, Roberts, Jackson, Byrnes, Stone

AGAINST THE RESTRICTION: Black, Murphy, Douglas, Reed

It will be noted that three Roosevelt appointees are on the majority, and that in this instance labor's picketing was restricted far more than freedom of speech and press in general.

When Texas licensed the business of union representative and let such license be prerequisite to making a speech inviting workers to join the union (*Thomas* v. *Collins,* 323 U.S. 516, January 8, 1945), the division was:

FOR THE REQUIREMENT: Roberts, Reed, Stone

AGAINST THE REQUIREMENT: Rutledge, Jackson, Douglas, Black, Murphy

In the labor field it may be assumed, safely or not, that the *Swing* and *Thomas* cases would have been decided differently by the pre-Roosevelt court, but peaceful picketing kept to its simple and familiar forms would have fared equally well before either court.

The landmark case in the Jehovah's Witness series was *Lovell* v. *City of Griffin,* 303 U.S. 444, March 28, 1938, and the issue was an ordinance vesting discretion in a public official for the issuance of licenses prior to the distribution of religious literature. The decision against the ordinance was unanimous, Hughes, Brandeis, Stone, Black, McReynolds, Butler, Roberts, and Reed sitting in the case.

An anti-handbill ordinance was applied to distributors of religious material in *Schneider* v. *State,* 303 U.S. 147, November 22, 1939.

McReynolds approved the restriction while Roberts, Reed, Hughes, Stone, Frankfurter, Douglas, and Black held it void.

The court divided sharply in *Martin* v. *City of Struthers,* 319 U.S. 141, May 3, 1943, and in other Jehovah's Witness cases decided the same day but touching other issues. The division in *Struthers* was on the question of permitting a community to apply a general ban on house-to-house canvassing to evangelists distributing literature:

FOR PERMITTING THE BAN: Frankfurter, Reed, Roberts, Jackson
AGAINST PERMITTING THE BAN: Black, Stone, Murphy, Douglas, Rutledge

Application of the tax power of a municipality to occasional vendors of religious literature, uniformly with other merchants of literature, was the issue, up for reconsideration, in *Jones* v. *Opelika,* 319 U.S. 103, May 3, 1943, and in *Murdock* v. *Pennsylvania,* 319 U.S. 105, May 3, 1943. The division:

FOR SUCH A TAX: Reed, Roberts, Frankfurter, Jackson
AGAINST SUCH A TAX: Douglas, Black, Stone, Murphy, Rutledge

The taxing of a minister on the same basis as other book agents when he made his living by full-time selling of religious literature was considered in *Follett* v. *Town of McCormick,* 321 U.S. 573, March 27, 1944:

FOR SUCH A TAX: Roberts, Frankfurter, Jackson
AGAINST SUCH A TAX: Douglas, Reed, Murphy, Stone, Black, Rutledge

An important decision in the regulation and taxation of newspapers was the final arbitrary (in light of the equally arbitrary opposite decision on religion as a business) separation of the press into two spheres, writing and editing, and business or manufacturing operations, along with the approval of governmental regulation of labor policies in the news writing department. This came in the case of *Associated Press* v. *NLRB,* 301 U.S. 103, April 12, 1937:

FOR NLRB REGULATION: Roberts, Hughes, Brandeis, Stone, Cardozo
AGAINST NLRB REGULATION: Sutherland, Van Devanter, McReynolds, Butler

This is the same pre-Roosevelt court which let picketing become a constitutional right, and this AP case, like *Senn* v. *Tile Layers Union,* was regarded as a liberal decision. Later the court by inference said that freedom of the press likewise was not involved in the

application of a general sales tax to newspaper publishing, when it denied certiorari in *Giragi* v. *Moore,* 301 U.S. 670, June 1, 1937. Even when the issue was the extent of discretion to be allowed the NLRB in dealing with newspapers, Douglas, Black, and Reed voted for the principle of wide leeway for the administrator. Stone, Hughes, Roberts, Frankfurter, and Murphy held that the administrative order must be clearly justified by the record. (*NLRB* v. *Express Publishing Co.,* 312 U.S. 426, March 3, 1941.)

In the application of the antitrust laws to the Associated Press (*Associated Press* v. *United States,* 326 U.S. 14, June 18, 1945) the vote was:

FOR REGULATING THE AP: Black, Reed, Rutledge, Douglas, Frankfurter
AGAINST REGULATING THE AP: Roberts, Stone, Murphy

There is little doubt this is another decision which could not have been obtained from the court before 1937.

The prevailing division running through the labor cases was on the degree of leeway to be given labor unions and the National Labor Relations Board. In view of the antipathy labor expressed for the daily press in its publications and in its meetings—and in spite of the things the publishers say about their employees who are members of the American Newspaper Guild—the AP cases might also be said to have been decided for the labor view and against the press. Stone, Roberts, and Murphy voted against labor in the *Meadowmoor* case, and Stone and Roberts also voted against labor in the *Ritter's Cafe* and *Thomas* v. *Collins* cases. Otherwise, it would be difficult to say that the great pre-Roosevelt justices, Stone, Roberts, Hughes, Cardozo, and Brandeis, were any less concerned for basic liberties than the men sent to serve on the court beginning in 1937.

With these matters of summary and review of national trends duly recorded, we may now proceed to a more detailed consideration of the action of the courts in all these issues.

CHAPTER II

Justice, the Courts, and the Press

WORKADAY RELATIONSHIPS BETWEEN COURT AND PRESS

THE courts exercise common-law and statutory powers to punish summarily for disturbances in the courtroom which interfere with the orderly processes of justice.

The newspapers operate in the faith that the constitutional guarantee will protect them in honest and well-founded criticism of public officials, including judges who wield the contempt power.

In the non-metropolitan areas of the country, court and press are often well known to each other. Usually the judge and the editor are acquaintances, sometimes personal friends, sometimes political antagonists.

Political antagonism existing in a city or country town creates a tense situation which sometimes breaks down into an acrimonious exchange of comment. At that moment the judge may wish to extend the contempt power from the walls of his courtroom to his antagonist, wherever he may be found within the jurisdiction. That wish no doubt is as old as the first judge who met criticism where he expected only respect, and the prevailingly human factors involved have left their mark on freedom of the press and on orderly administration of justice, perhaps to the benefit of both.

That spats between judge and journalist are fairly common can be demonstrated by a brief review of cases obtaining publicity in *Editor & Publisher* in a brief period of time selected at random.

As 1932 opened, Judge Henry R. Prewitt of Kentucky was presiding over the trial of a miner charged with conspiracy in a murder. Over the objections of the defense, Judge Prewitt permitted the prosecutor to harangue the jury at length, less on the subject of the miner's complicity in the crime, if any, than on the subject of Russia, Communism, and the American home. The trial was taking place in Mount Sterling, a place where the first two were unpopular and the third of the prosecutor's oratorical trinity could be and

would be defended by any jury. The defendant, somewhat to his bewilderment, found himself convicted.

The Knoxville (Tennessee) *News-Sentinel* was represented in Judge Prewitt's court by a staff writer who covered the trial in some detail. After the defendant's conviction, the paper criticized the tactics of the prosecution in an editorial which contained the following sentence:

> As long as our courts permit themselves to be a stage for the tirades of political and social prejudice, they will not obtain full confidence of those who believe in even-handed justice.[1]

Judge Prewitt immediately sentenced the reporter for contempt and barred any representative of the *News-Sentinel* from his courtroom. The *News-Sentinel* proved not unequal to Judge Prewitt's challenge, and Newton D. Baker, its attorney, immediately appeared to represent the reporter. In the face of such eminent legal talent Judge Prewitt played the kind of legal game popularly known as the runaround. Forthwith he reconsidered the contempt citation and revoked it. Faced then only with his flat bar of any Knoxville *News-Sentinel* employees from his courtroom, the judge rendered it a nullity by transferring the cases in which the newspaper was interested back to the court whence they had come to him on a change of venue.

The Kentucky statutes, Sections 1291–95, limited contempt citations to matter spoken or written in the judge's presence. But Judge Prewitt, in a moment of irritation, probably being himself under the spell of the prosecutor's oratory, struck at a paper printed in another state through its reporter on the scene.[2] And by the time an appellate court could take up the case, the order had been amended sufficiently to save the judge further embarrassment.

J. W. Mapoles, editor of the Hopewell, Virginia, *News,* and Judge Thomas B. Robertson of the Hopewell Corporation Court were well acquainted, and each in his own fashion was dedicated to the upholding of law and order. But when Mapoles wrote a story about a defendant in Judge Robertson's court who was acquitted on a charge of illegal sale of intoxicating liquor, it seemed to so scandalize the court, in the judge's opinion, that only a fine of ten dollars for contempt could atone for the attack. As part of the same proceeding, the police chief was also fined for contempt, though seventeen

[1] *Editor & Publisher,* Vol. 64, No. 34 (January 9, 1932), p. 5.
[2] *Ibid.,* No. 35 (January 16, 1932), p. 8.

of the twenty-four lawyers in Hopewell signed a round robin petition asking the judge to acquit him.

Shortly afterward, Mapoles published a letter in his paper which so infuriated Judge Robertson that he demanded the author's name of the editor in a formal appearance in court. The editor preferred not to tell and was sentenced to five days in jail. Before a hearing could be held on Mapoles' application for a writ of habeas corpus, Robertson ordered his release.[3] Nineteen Virginia editors petitioned the General Assembly of the state to impeach Judge Robertson, and a legislative committee investigated his judicial behavior. It reported that the judge was evidently irritated in this instance, but upheld his action at least to the extent of doing nothing more about it.[4]

Editor Howard C. Anderson of Aberdeen, South Dakota, lived in a county where officials had misapplied and misappropriated $250,000 in ten years. When a former county auditor received a six months' suspended jail sentence and a three-hundred-dollar fine on his plea of guilty to third degree forgery charges, Anderson complained editorially of Judge Howard Babcock's leniency. For his temerity in discussing this somewhat notorious public matter, Anderson and two associates were cited for contempt and given their choice of thirty days in jail or vows of perpetual silence. Judge J. H. Bottum heard the contempt charges and performed for his colleague the chore of meting out punishment.[5]

A jury acquitted a defendant charged with murder in Brooklyn, and a reporter for the Brooklyn *Eagle,* Richard W. Thomas, went to question a juror, as his editor had told him to do. The juror said that he and the others voted to acquit because the judge instructed them to do so if there was "any degree of doubt." This was a misrepresentation of the judge's actual charge, which had instructed acquittal if there was "reasonable doubt." The publisher, M. Preston Goodfellow, the managing editor, Harris M. Crist, and the reporter, Thomas, came to court under summons to explain. The judge reserved decision for two weeks and, having disturbed the peace of journalistic minds about as much as the judicial mind had been perturbed, turned them loose.[6]

A grand jury in Greenville, South Carolina, in an official present-

[3]*Ibid.,* No. 34 (January 9, 1932), p. 7.
[4]*Ibid.,* No. 43 (March 12, 1932), p. 41.
[5]*Ibid.,* No. 39 (February 13, 1932), p. 6. and No. 40 (February 20), p. 5.
[6]Justice Wiley Rutledge, in *Pennekamp* v. *Florida,* 328 U.S. 331, 370–71 (1946) diagnosed troubles such as Thomas' as due to inexpertness of the sort to be expected, but not desired, from laymen covering courts. Justice Rutledge's opinion shows that he believes errors in court news reporting rank very high among the many inaccuracies popularly charged to newspapers.

ment, announced its intention of investigating a sheriff on charges of embezzlement. Judge M. M. Mann banned publication of the presentment or any news based on it, but relented after the newspaper hired attorneys and challenged the rule in the judge's own court.[7] In the meantime the paper had published the story anyway and faced contempt.

The Julian Petroleum Company, with a hundred million dollars' worth of stock in public hands, was declared insolvent. The Los Angeles *Record,* prying into the debris simultaneously with agents of the court, found itself cited in contempt on thirteen counts proposed by a bar association which was on crusade against "trial by newspaper." It took the *Record* two years to prevent the judge who accused it from sitting in his own case. After a total of three years the bar association withdrew the charges. The whole matter seemed to the *Record* to be an experience with duress and censorship encountered in covering the news. To the bar association, of course, it still seemed like trial by newspaper.[8]

One other instance of run-of-the-mine clashes between the newspapers and the courts will suffice to introduce the national policy in such matters as it has been developed by the United States Supreme Court.

A grand jury in Hidalgo County, Texas, indicted two prominent citizens and so reported to Judge R. M. Bounds. C. H. Pease, editor of the *Independent,* looked at the grand jury and found men there he knew well. After reporting the indictment in a news story, he added his opinion: "The general view over Hidalgo County is that these indictments were for political purposes only."

Judge Bounds asked editor Pease to explain this statement, issued an attachment for contempt and passed sentence of three days in jail and a fine of a hundred dollars. Following legal custom, Judge Bounds waved aside offers to prove the truth of the objectionable statement, applying the old rule of seditious libel—"the greater the truth the greater the libel"—to interferences with the processes of justice.[9] Ten months later, after Pease had found in his resources wherewithal for lawyers and an appeal, the Texas Court of Criminal Appeals set aside Judge Bounds' attachment, saying that Pease should have been allowed to prove the truth of what he had written.[10] The articles were not contemptuous anyway, said the court.

[7] *Ibid.,* No. 45 (March 26, 1932), p. 12.
[8] *Ibid.,* Vol. 65, No. 3 (June 4, 1932), p. 8.
[9] *Ibid.,* Vol. 64, No. 52 (May 14, 1932), p. 10; Vol. 65, No. 1 (May 21, 1932), p. 10.
[10] *Ibid.,* No. 41 (February 25, 1933), p. 11.

The pendency of this case for ten months amounted to a virtual censorship of the *Independent* with reference to the political aspects of its troubles. The judge, of course, acted in good faith, but the effect would have been the same otherwise.

While the struggle for freedom of the press in England was at its height, cases such as these often resulted in cruel and unusual punishment for the editors involved. No such dangers confronted the American journalists, but the possibility of a court citation is in the minds of editors as they work. The prospect of lawyers' fees and appeal costs causes reiteration in their minds, on such occasions, of the truth of the old adage, "Speech is free but proving it is not." There could be no objection to the power of the courts and to their disposition to use it if such action merely restrained rash and uninformed criticism. But the knowledge that the contempt power could be freely used intimidated even wise editors, and the public interest is not always best served by silence.

NEW PATTERN OF CONSTRUCTIVE CONTEMPT: THE MIAMI *HERALD* CASE

The Supreme Court of the United States reasoned in much this way in 1946 when it arbitrated a dispute between the Miami *Herald* and the Florida courts. John D. Pennekamp, associate editor of the *Herald,* had the editorial-page job of interpreting the news on behalf of his paper for the metropolitan center of Miami. His associates, the reporters, personally covered such news centers as the government offices and the state courts. Pennekamp read their items in the paper each day and conferred with them when he wanted clarification of some point in the news. Then he wrote editorial comment or interpretation, so that the readers of the *Herald,* if they wanted to, could have a little deeper insight into the meaning of the day's events.

Pennekamp and his associates were laymen, not lawyers, and perhaps they fell under Justice Rutledge's gentle stigma previously noted. But they performed a service for the people of Miami which they could not otherwise obtain, because they went into the offices of the people's governments and the people's courts and reported what they saw and heard. If the people of Miami knew anything about their government or about their courts, Pennekamp and his associates were largely responsible.

Reading the news and talking to reporters, perhaps making inquiries on his own behalf, Pennekamp gathered material for an

editorial on the state district courts in Miami. As a vigorous editorial writer should, he related his admonition and exhortation to the day's news; when he saw a needless delay in the fact that several indictments in rape cases had been returned to the grand jury for correction, he said so. His comment was not wholly justified, for the papers seemed incorrect as to form and had been returned to the grand jury with the consent of the prosecutor. But Pennekamp was denouncing delay and unnecessary confusion in the state's system of justice, and he obviously was sincere. Besides, in the day's news he saw that the case of a padlocked night club, which had been handled by one judge under a temporary restraining order, suddenly was reopened, after a long unexplained delay, before another judge, and the club freed of restraint. The prosecutor, who had proposed the original injunction, was busy with the grand jury, and the court did not wait for him. It seemed to Pennekamp that the court was in too big a hurry for justice to be done, and in his own way he said so in the day's editorials.[11]

A cartoon accompanying one of the editorials showed a man in the robes of a judge seated in a massive chair labeled "The Law." He was handing a scroll inscribed "case dismissed" to a burly fellow who seemed well pleased, and across on the other side of the bench an undersized man, acting in the public interest by his own admission, was exclaiming, "But, Judge!"

This criticism drew Pennekamp and his publication into the state and federal courts for more than a year. Then the Supreme Court of the United States forced on a reluctant Florida supreme court its view that constructive contempt, hardly a valued part of the American system of jurisprudence, might be used, if at all, only when the danger was so great and the degree of imminence so high that the court could not conduct its business in the face of the attack.

Pennekamp's charges, when first made, had brought violent reaction from the Florida courts. They were painted as scandalizing the court, as based on half-truths, as affecting cases still pending and thus as tending to intimidate and coerce the court and to paralyze the orderly processes of justice. Two state supreme court justices dissented, Justice Rivers Buford writing for both that he could take the majority opinion and reach an exactly opposite result with its reasoning. "There is nothing in the editorials," he wrote, "which imputes want of fairness, impartiality, or integrity to any judge or any court." He added:

[11] *Pennekamp* v. *Florida*, 328 U.S. 331 (1946).

Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case then pending in any court. They appear to adversely criticize a judicial system which, to protect the rights of the righteous, must, by the same token, see that the alleged rights of the unrighteous are determined.[12]

Justice Buford relied on the decisions of the United States Supreme Court as requiring a reversal of the contempt sentence.

The Florida supreme court regarded the clear and present danger test as not analogous to most of the state cases. "Even if this test is to be the rule in the State courts they are authorized to apply it by their own law and standards and unless the application is shown to be arbitrary and unreasonable, their judgment should not be disturbed," the court asserted.[13] It went ahead to hold that the cases were pending at the time Pennekamp published his criticism, and to state that "it is utter folly to suggest that the object of these publications was other than to abuse and destroy the efficiency of the court."

With Justice Reed writing the opinion, the United States Supreme Court kindly but firmly rejected the Florida court's reasoning. It remarked that although it had power to "ransack the record" for facts, its custom was to accept the state court's determination of the facts. It agreed that the cases were pending, but observed that in borderline cases "we think the specific freedom of public comment should weigh heavily against a possible tendency to influence pending cases."[14]

The law could not depend upon a judge's moral courage in the face of comment on a pending case, Justice Reed asserted, and as to the effect of Pennekamp's comment on juries not yet drawn to try cases not yet ready for trial, this seemed "too remote for discussion."

If the judges were defamed by the Miami *Herald*'s report and criticism, they had "such remedy in damages for libel as do other public servants." In the meantime, the court felt that the people of Florida would recognize a good judge and a fair judicial act and that they would resent unfair treatment of a judge by a newspaper.

"We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment. When that door is closed, it closes all doors behind it," Justice Reed declared.[15]

[12] *Pennekamp* v. *State*, 22 So. 2d 875, 887 (1945).
[13] *Pennekamp* v. *Florida*, 328 U.S. 331, 344–45 (1946).
[14] *Ibid.*, 347. [15] *Ibid.*, 349–50.

Justice Frankfurter, swinging his brilliant verbal shillalah hard against the formalism of the clear and present danger test used by the court, joined the court's opinion mostly in the result. He ridiculed the test's usefulness and advocated his own version of the reasonable tendency rule which the court had abandoned earlier. The words he would punish as contemptuous seem to be those "reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the court." In short, the justice was seeking a device by which "trial by newspaper" could be identified readily and punished. At the same time, the Florida court's idea of a pending case seemed to him farfetched. The cases upon which Pennekamp commented were not actually pending "for purpose of punishing for contempt as interference . . . The decisive consideration is whether the judge or jury is, or presently will be, pondering a decision that comment seeks to affect."[16]

Justice Murphy and Justice Rutledge separately concurred, the former detailing his faith in the test, the form of which Justice Frankfurter decried. Said he:

> To talk of a clear and present danger arising out of such criticism is idle unless the criticism makes it impossible in a very real sense for a court to carry on the administration of justice. That situation is not even remotely present in this case.[17]

HISTORICAL DEVELOPMENT OF THE CONTEMPT POWER

The Turning Point: *Bridges* v. *California*

The *Pennekamp* case made no law. Instead, the principles were old to American law. They had been allowed to lapse in large part, however, by an apathetic public and courts enamored of their "immemorial rights." These libertarian principles had been revived in the opinions of Justice Holmes and brought back to life by men on the court who shared his point of view, the revival being complete by 1941 when the key case in the series, *Bridges* v. *California,* was decided.[18]

The opinion in *Bridges* v. *California* also covered the case of the *Times-Mirror Co.* v. *Superior Court.* Both cases had aroused the ire of the courts because of elements of intimidation involved. The coercion attributed to Bridges was that, as a labor leader, he had sent a telegram which threatened a strike of his longshoremen in retaliation for an order distasteful to him. The telegram was ad-

[16] *Ibid.,* 369.
[17] *Ibid.,* 370.
[18] 314 U.S. 252 (1941).

dressed to the United States Department of Labor and was published in part in the newspapers. It was newspaper publication to which the California courts objected, not dispatch of the telegram to the labor department.

The *Times-Mirror* case concerned editorials which had similar threatening tendencies. One of the editorials, in particular, strongly cautioned the state court against granting applications for parole filed by two men convicted of property destruction in a labor dispute.

According to Justice Black, who wrote the court's opinion, the courts here were seeking to silence the press at a time when public discussion of public issues was crucially important. How could a judge be intimidated by the publication of Bridges' telegram when he knew from the moment of handing down his order that it was likely to precipitate a strike? As for the court's fear of the Los Angeles *Times,* in the event he decided not to take the paper's advice, did not performing the duties of a judge in California guarantee criticism at one time or another from this well-known antilabor newspaper?

The thing for a judge to do, according to Justice Black, was to blame the pressure of events on the events, not on publication by the newspapers of the facts of life. To take any other course of action seemed to the court to be resorting to unnecessary censorship, unnecessary in part because the public could be relied upon to sustain a fair court against unfair newspaper comment, and in part because the even course of justice was not really disturbed by the newspaper comment in question.

Heretofore, a newspaper cited for contempt usually sought to demonstrate that the case alluded to was closed, or closed for all practical purposes. But in the *Bridges* case the court faced squarely the issue of the actual present effect that newspaper comment had on the administration of justice, and returned the nation's policy on contempt to the status it had in the early days of the Republic.

The lapse and revival of this policy deserve somewhat detailed historical treatment, for not only do they indicate the processes by which constitutional law, like faithful putty, yields and yields again to the men of the Supreme Court, but they constitute a major chapter in the history of the court majority which President Roosevelt appointed.

Perhaps it is well to discuss the legal principles involved under the following headings: the nature of the contempt power, the right to trial by jury, the guaranty of freedom of the press, the concept of

the pending case, the reasonable tendency rule, and the clear and imminent danger test.

The Basis of the Contempt Power

Although the Constitution itself does not mention the contempt power, it has been developed in this country as necessary and proper to carrying on the judicial power. As Justice Black stated in *Bridges* v. *California,* "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open courts."[19] Or, as the Massachusetts constitution puts it: "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will permit." Anything which obstructed these orderly and fair processes under the judicial power, then, opposed public policy and ought to be punished or restrained. The contempt power and the contempt technique of summary punishment came to be used for this high purpose.

As Walter Nelles and Carol Weiss King showed in relating the history of the contempt power to 1928, men being what they are, and judges being but men dressed in the robes of the judicial power, the high purpose for which the contempt power allegedly was conceived and for which it is applied is not always discernible.

In short, immemoriality is largely a myth as applied to constructive contempt. It has been established and maintained in the United States in the teeth of the people and the legislatures and in violation of the spirit of American institutions. Its early use in Pennsylvania and New York brought severe public reaction and specific limitation at the hands of the legislatures. And in 1831, after the notorious political dispute in which Federal Judge Peck used the contempt power to punish a critic, the Congress passed a law defining the contempt power and limiting it to misbehavior either in the courtroom or "so near the presence of the court as to obstruct the administration of justice."[20]

From this background of principle, the idea of a limited contempt power eventually was adopted by thirty-six states, but the Civil War started a reaction which swept the old repressive concept back, allowing judicial discretion to "set its own limits" in the field.[21] These limits, until 1941, permitted the courts to reach anywhere in their

[19]314 U.S. 252, 271 (1941).

[20]Walter Nelles and Carol Weiss King, "Contempt by Publication in the United States," *Columbia Law Review,* Vol. 28, No. 4 (April 1928), p. 401, and No. 5 (May 1928), p. 525, *passim,* and p. 530.

[21]R. E. Herman and others, "Recent Limitations on Free Speech and Free Press," *Yale Law Journal,* Vol. 48, No. 1 (November 1938), pp. 58–59.

jurisdictions and to seize and punish persons held to be obstructing the judicial process. The punishment was on the basis of a hearing before the judge and without a jury. Where legislative acts attempted to limit the judges, these acts were swept aside as infringements of the immemorial power.[22] And the federal statute met the same fate as the state safeguards.

Robert Herman, before the *Bridges* case, classified matter in the field of contempt proceedings this way:

> False, grossly inaccurate, or garbled reports of court proceedings compose the clearest type of contempt; hence these cases are least frequently appealed. Such statements are punishable whether the suit be already adjudicated, still pending, or yet to be tried, for the essence of the contempt is that the falsity of the report misinforms the public as to the course of judicial decision on a controversial topic, and thus induces reliance on an erroneous interpretation of the law.
>
> A few jurisdictions recognize a second class of contempts by publication, and punish summarily for "scandalizing the court," i.e., ridiculing particular courts, judges, counsel, parties, jurors or judicial officers or publishing matter calculated to bring the court into disrepute. Again, the rule applies to all publications, before, during, and after the trial, since the theory of the contempt is that apart from the particular suit, the resulting loss of prestige diminishes the general usefulness of the courts, and obstructs the proper conduct of their proceedings. . . .
>
> [As to the third class:] Most conflict, however, centers about the publication of matter which, regardless of whether it is false or scandalous, has "reasonable tendencies" to prejudice or obstruct the orderly administration of justice. Unlike the first two classes, this category is usually limited to the period of time during which a case is pending . . .[23]

Right to Trial by Jury

Since the summary procedure of the contempt hearing violates the spirit of American civil liberties, part of the agitation against its use has been directed at the idea of a judge sitting without a jury in his own case. The agitation has made no progress, except that in some jurisdictions the decision on issuing a contempt attachment is put up to a judge not directly involved in the controversy. Perhaps the reason is the real and valid nature of the contempt power as applied to in-court incidents and matters of court process. In such matters the needs of the court are allowed to control when the judicial power is strained to cover constructive contempt. The general

[22]The exceptions were Pennsylvania, New York, South Carolina, and Kentucky. See Justice Edmonds' opinion, 94 P. 2d 983, 1002 (1939)

[23]Herman, "Recent Limitations on Free Speech and Free Press," *Yale Law Journal*, p. 60.

agreement that a judge does not need the advice of a jury in maintaining order in his own courtroom has been allowed to excuse the real wrong involved in handling indirect contempt without a jury.

The tendencies toward reform have moved rather toward eliminating from this process matters which are sometimes handled under the contempt power but do not concern misbehavior in court, and either requiring indictment or leaving it up to the judge who feels aggrieved to sue for damages. The court decisions state that due process does not require jury trial in matters of contempt.[24]

Justice Holmes, dissenting in the *Toledo Newspaper Company* case, said:

> When it is considered how contrary it is to our practice and ways of thinking for the same person to be accuser and sole judge in a matter which, if he be sensitive, may involve strong personal feeling, I should expect the power to be limited by the necessities of the case "to insure order and decorum in their presence," as is stated in *Ex parte Robinson,* 19 Wall. 505. . . . And when the words of the statute are read it seems to me that the limit is too plain to be construed away.[25]

At the conclusion of his dissent, Justice Holmes distinguished between in-court contempts requiring immediate action and those which the court feels free to take up at its convenience. "When there is no need for immediate action contempts are like any other branch of the law and should be dealt with as the law deals with other illegal acts."[26] This may be interpreted as suggesting process by indictment and trial by jury or civil suit for damages.

Justice Douglas, writing the majority opinion in *Nye* v. *United States,* disapproved use of the contempt process to reach a man deemed unduly to have influenced a plaintiff in a pending suit to withdraw it, and suggested that the act "be dealt with as the law deals with the run of illegal acts." The disputed act did not take place in or near the court, and if the suggestion had been followed Nye would have been able to present his story to a jury.

At least two instances in which jury trials have been granted in constructive contempt have been noted,[27] and Robert E. Herman

[24]*Interstate Commerce Commission* v. *Brimson,* 154 U.S. 447, 489 (1894); *Bridges* v. *California,* 303; Nelles and King, *op. cit.,* p. 407. ("Our constitutions, sometimes explicitly, guaranteed the right of trial by jury only 'as heretofore.' If publications had 'heretofore' been summarily punishable as contempts . . ." under British law there was no right to jury trial.)

[25]247 U.S. 402, 423 (1918).

[26]*Ibid.,* 425.

[27]Oscar F. Belin and others, "The Constitutionality of Legislation Providing for Jury Trials in Contempt Cases," *Journal of the Bar Association of the State of Kansas,* Vol. 6, No. 4 (May 1938), p. 270. Cases cited are at 266 U.S. 42 and 174 A. 11.

asserts that "the more practical solution probably lies in regulatory legislation substituting trial by jury for the discretionary summary power of the court in contempt-by-publication cases."[28]

Such legislation may be possible now, but it seems that before 1941 a requirement of jury trial, like the statutes limiting citations to in-court affairs, would have been held by the courts to violate their immemorial powers.

The Guarantee of Freedom of the Press

The British system of government, having a sovereign Parliament which recognized no infringements of its power, could never know freedom of the press in the same way as the American states. Yet English usage and custom have been cited constantly as an excuse for limiting and as a means of interpreting the American Bill of Rights.

The operation of a constitutional guarantee of freedom of the press, however, required the support of the courts, and where freedom of the press and the guarantee of fair trials conflicted the courts had to arbitrate the dispute.

The reconciling of conflicts was such a natural process to the courts that the adjustments with the press required no new processes. But in the mental task facing the judges there was the inevitable temptation to favor the needs of a friend over those of a stranger.

Thus the courts have found it easier to limit freedom of press than to accommodate themselves to its pressures. And thus Harold W. Sullivan could say: "No question of freedom of the press is really involved in proceeding summarily against contemptuous publications that amount to trial by newspaper."[29] In so saying, he could be certain that he spoke for perhaps a majority of attorneys. For, to the lawyer raised in the cold tradition of the law rather than in the living spirit of American institutions, freedom of the press means nothing but freedom from prior restraints with full responsibility after publication. And he will offer to prove it by the common law and by the great commentaries which were the textbooks of American lawyers in the formative period of our court system.

Sullivan adds:

> Freedom of the press is an ungrateful child. All that it is, and all that it may ever hope to be, it owes to the courts. Without the solicitous care of courts in liberally construing constitutional provisions guaranteeing

[28]R. E. Herman, "Recent Limitations on Free Speech and Free Press," *Yale Law Journal*, p. 66.

[29]Harold W. Sullivan, *Contempts by Publication*. (Privately printed, 1940), p. 166.

freedom of press, it might well have disappeared under the eroding force of judicial construction had the course of decision taken that turn. Yet it is upon the very institution that has nourished this frail right that freedom of the press turns to repay its fostering care with destruction in the form of trial by newspaper.[30]

Sullivan seems to be regarding the courts as ends in themselves. And any right which has survived its handling by the courts as well as has freedom of the press does not deserve the appellation "frail."

The device by which the press has been saved is the due process clause of the Fourteenth Amendment applied against the states.[31] The difference between the fear-ridden period ending in 1941 with *Bridges* v. *California* and the later period is due partly to the restraint on the state courts and partly to the return of the federal courts to the rule worked out by the state and federal legislatures early in the independent existence of the country.

The press and the courts are coholders of both freedom and responsibility under the American Constitution. The relationship that should exist between them cannot be achieved by a schoolmasterish attitude on the part of the judges or a tutorial attitude on the part of the press. Neither freedom of the press nor fair and orderly judicial process need suffer in the accommodation of these rights and privileges to each other.

The Rule as to Pending Cases

Except in the matter of "scandalizing the court," the press has been free to criticize judicial decisions in a case which is closed. It is difficult for a newspaper to interfere with the processes of justice in a case where all action that affects the defendant's rights has been taken. Nevertheless, contempt citations cluster about the closing stages of trials, and famous cases like *Bridges* v. *California* and *Patterson* v. *Colorado* rested in part on the highly technical and really meaningless point that the publications which allegedly obstructed justice had been made before the time for a rehearing had lapsed.

The courts have strained the pending case rule to its utmost in handing down contempt citations. The United States Supreme Court was told in the *Bridges* case: "To hold that publications may be punished merely because the time for rehearing has not expired

[30] *Ibid.*, pp. 166–67.

[31] The historical record is presented by Charles Warren, "The New 'Liberty' Under the Fourteenth Amendment," *Harvard Law Review*, Vol. 39, No. 4 (February 1926), p. 431. See also the *Gitlow* case, 268 U.S. 652 (1925), and *DeJonge* v. *Oregon*, 299 U.S. 353 (1937).

exalts form above substance, establishes a criterion lacking in reason, and sets a trap for the unwary."[32]

But in state cases the state court determines when a case is closed, and its decision is not disturbed by the United States Supreme Court. This partly explains why the rule as to pending cases has broken down and more realistic criteria have been substituted. Justice Frankfurter, in his dissent in the *Bridges* case, asserted: "When a case is pending is not a technical, lawyer's problem, but it is to be determined by the substantial realities of the specific situation."[33]

Those substantial realities the justice found by determining whether or not there was "a real and substantial threat to the impartial decision by a court . . ."[34]

Justice Black, in his majority opinion in the *Bridges* case, showed the real threat to the public interest in the application of a rule which forbids comment on a pending case:

> Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.[35]

The controversies in court which the public may not discuss, then, are likely to be the most important ones of the day. Justice Black declared that freedom of the press cannot be in inverse ratio to timeliness and importance. Yet, he said, the rule sought by California would make it so—as much so as if a

> deliberate statutory scheme of censorship had been adopted. . . . An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgement of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months or even years rather than days or weeks.[36]

This portion of the opinion implied that the court was moving toward a rule which would open all cases to all comment, except that which would bring about some substantive evil the courts or the legislatures are authorized to prevent.

The other extreme in use of the pending case rule by a trial court

[32] 314 U.S. 252, 254 (1941). Compare *Sullens* v. *State*, 4 So. 2d 356 (1941) and *Pulitzer Publishing Co.* v. *Coleman*, 152 S.W. 2d 640 (1941).
[33] 314 U.S. 303–4.
[34] *Ibid.*, 303.
[35] *Ibid.*, 268.
[36] *Ibid.*, 269.

is seen in *Ex parte McCormick*. Here newspapers were instructed not to publish testimony in a murder trial because it was applicable to two other cases on the calendar. The newspapers disobeyed, on advice of counsel, and in setting aside the resulting contempt attachment the Texas court of criminal appeals said that under the state statute opinions formed from reading newspaper accounts may not disqualify a juror from sitting in a particular case. Intelligent jurors will inevitably keep up with the day's news, the court said, and they will not necessarily form "an opinion so fixed as to render them incapable of forming an impartial judgment from hearing the evidence revealed by a witness, under oath, in a given case."[37]

The existing rule, then, confines contempt citations to a pending case in any circumstances, but courts may no longer rely mainly on the technical pendency of a case to support a citation suppressing freedom of press. Comment in such matters must now be examined for evidence of a clear and present danger that a substantive evil confronts the courts, an evil so serious that it must be avoided even at the price of limiting freedom of the press.

The Rule of Reasonable Tendency

When the United States Supreme Court decided *Bridges* v. *California,* it flatly rejected the idea that an inherent tendency rule and a reasonable tendency rule could be utilized in deciding whether out-of-court publications were contemptuous. The reasonable tendency rule was eliminated, however, under strong protest of a four-judge minority, and Justice Frankfurter's dissent in the case and his comment in the Pennekamp case have continued to receive strong support. The rule has both sufficient historical interest and sufficient vitality in the cellular structure of the living law to justify a brief account of it here.

The basic purpose of contempt, it must be remembered, is to eliminate obstructions in the orderly processes of justice. Just where the curative power is to be applied has been the bone of contention since time immemorial. Until the *Bridges* case, the presiding judge decided arbitrarily that an utterance had a reasonable tendency or an inherent tendency to interfere with justice. Chief Justice Edward D. White stated the rule in *Toledo Newspaper Co.* v. *United States.*[38]

It was not necessary, he said, for the government to prove obstruction, but merely to show a tendency to obstruct. The wrong de-

[37] *Ex parte McCormick*, 88 S.W. 2d 104, 105 (1935).
[38] 247 U.S. 402, 419 (1918).

pended "on the tendency of the acts" to bring about a baleful result, he said, and the extent to which they have been successful was not to be considered.[39]

Justice Holmes, in *Patterson* v. *Colorado,* said: "If a court regards, as it may, a publication concerning a matter of law pending before it as tending toward such an interference, it may punish it."[40]

Osmond K. Fraenkel and A. L. Wirin argued in the *Bridges* case before the United States Supreme Court that the reasonable tendency test would "enmesh anyone who criticizes a judicial decision immediately after it is rendered, if a judge can be persuaded that the critic ought to have foreseen that his words might have some effect on the judge criticized or on the public opinion reaction to courts in general."[41]

The reasonable tendency test, as applied to constructive contempt, was rendered vague and indefinite because it was affected by the judge's state of mind, which in turn might depend upon the weather or the mere pressures of the day's business. Human sensitiveness, often a factor in contempt cases, is poor substance for a constitutional yardstick. How far Justice Frankfurter, defender of the reasonable tendency rule, was from the usual application of it can be seen in his comment in the same case:

> A publication intended to teach a judge a lesson, or vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed.[42]

If common sense has any help at this point, it would be that evidently the reasonable tendency test had been used to suppress liberty so consistently, and that its authority gave judges such a feeling of security in smashing down critics, that it became imperative to find a substitute which would lead to greater liberty while still preserving emergency power. That substitute, the clear and present danger test, was a symbol more than a test, for it was associated with some of the most stirring incidents in the modern history of individual lib-

[39]Justice Edmonds, in his lone dissent in the *Bridges* case in the California court [94 P. 2d 983 (1939)] said White's research "ended with his own opinion written a year and a half earlier in *Marshall* v. *Gordon,* 243 U.S. 521, dealing with the power of Congress to punish summarily for contempt." See p. 1003.

[40]205 U.S. 454, 463 (1907).

[41]314 U.S. 252, 254 (1941).

[42]*Ibid.,* 291.

erty.[43] If nothing else, it should have been more difficult for a court to suppress liberty through the contempt power if it were forced to cite and to apply a test so powerfully associated with personal liberty and against government oppression. At any rate, it was effective, as *Graham* v. *Jones*[44] and *Pennekamp* v. *Florida*[45] so well demonstrate. The fact that the Florida court declined to apply it, pleading state's rights, is evidence of this effectiveness as well as are the dignified reluctance of the Louisiana court in *Graham* v. *Jones,*[46] and the attempt of the Texas court in *Craig* v. *Harney*[47] to put the Bridges case in a class by itself.

Clear and Present Danger

This success is explained by the fact that absurdities are less likely to be mixed in application of the clear and present danger test than in the reasonable tendency test. When the great Babe Ruth, in his heyday, drove a fly ball down the right field foul line there was some tendency for the ball to cross the foul line and stop the runner. Baseball umpires usually are wise enough, however, not to make their rulings on close cases while the ball is still in the air.

Those who judge matters affecting the processes of justice face similar uncertainties, and they insist that the safety of the state requires them to act before the threat in question actually materializes into a form which can be analyzed adequately.

Under the clear and present danger rule, the umpire who makes the decision must delay his decision as long as he can, even waiting for the overt act if its consequences seem to lack great importance. And his mental control should enable him to distinguish between damage to the machinery of justice and personal discomfort in the presence of criticism.

Clearly, with the application to constructive contempt of the test used in the syndicalism cases, the Jehovah's Witnesses cases, and the early picketing cases, notably *Thornhill,* the judge has moved to a new vantage point, where the perspective seems much better designed for preservation of both the courts and the press.

In the words of Justice Black in the *Bridges* case, "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the

[43] Justice Black mentions *Schenck, Abrams, Whitney, Cantwell, Herndon,* and *Thornhill, ibid.,* 262.

[44] 7 So. 2d 688 (1942).

[45] 22 So. 2d 875 (1945).

[46] 7 So. 2d 688 (1942).

[47] 67 Sup. Ct. 1249 (1947).

degree of imminence extremely high before utterances can be punished."[48]

The test was applied by the Supreme Court of Louisiana in a series of cases prompted, as in the *Bridges* case, by outside parties. The people of Louisiana had discussed and finally approved a series of constitutional amendments. These amendments were part of the reform program of the political faction which succeeded to power upon the fall of the old Huey P. Long machine. Shortly after the election, a district court was requested to hold the amendments defective and null and void because the draftsmen had covered two subjects with one amendment and title. The court held the amendments unconstitutional as to form, and it was sustained by the state supreme court, which was made up in part of justices elected during the time that endorsement of the Long faction was necessary to success at the polls.

Immediately after the district court decision the administration of Governor Sam Jones and newspapers of the state began to discuss the constitutionality of the amendments and to urge their validity. Governor Jones' adherents soon raised a public clamor which had a tendency to influence the state's highest court in its consideration of the matter.

After the state supreme court, in a five-to-four decision, had nullified the amendment, the newspapers and several speakers frankly asserted that the influence of the old Long faction was behind the decision, and treated the opinion editorially as one favoring a corrupt machine. Retaliation was suggested against government by the courts and especially against the five-member majority. The plaintiffs who had brought the suit in the first place then filed a motion for eleven separate rules for contempt against newspapers and individuals who were deemed chief among the thousands of offenders.[49]

The Louisiana court reviewed the decisions on contempt and stated flatly that it would punish the defendants under the rule as it stood prior to the *Bridges* case. But:

We can not truthfully say that the result of the publications under review here was to create a clear and present danger of substantive evils. Certainly, they had no influence on the members of this court in their deliberations and in the conclusions reached by them in the suit. Although the obvious purpose of the editorials was to force a decision by this court in

[48]314 U.S. 252, 263 (1941). For the original application of this test by the court, see *Schenck* v. *United States*, 249 U.S. 47, 52 (1919).

[49]*Graham* v. *Jones: In re Times-Picayune Publishing Co., Inc.*, 7 So. 2d 688 (1942); *In re Ott*, 7 So. 2d 695 (1942); *In re Gugel*, 7 So. 2d 699 (1942); *In re Campbell*, 7 So. 2d 702 (1942); *In re Heywood*, 7 So. 2d 703 (1942).

accordance with the conceptions which the writers were maintaining, there never was any clear and present danger that their purpose could or would be accomplished, as clearly appears from the decision itself.[50]

This somewhat sardonic tribute to the clear and present danger rule emphasizes its divergence from the reasonable tendency formula. A major change in the evaluation of contempts was wrought by the *Bridges* opinion. It met stubborn resistance from the state courts, as the *Pennekamp* case indicated, and as *Craig* v. *Harney,* a Texas decision, emphasizes.[51] Here a local newspaper quite frankly joined in a community-wide campaign to secure a new trial in a forcible detainer case for a soldier serving overseas. The case arose in county court under a layman judge, and the trouble started when the jury, although instructed to do so by the court, declined to sign a verdict holding invalid the soldier's lease on a business building. It appeared from the testimony that the soldier had not paid the rent according to contract, or at best had offered a post-dated check for the rent installment in question.

Two days before denying the soldier a new trial the court cited Conway C. Craig, Bob McCracken, and Tom Mulvany, executives of the Corpus Christi *Caller-Times,* for contempt, charging intimidation and coercion. The Texas court of criminal appeals upheld the contempt judgment and said it was justified under the clear and present danger rule of the *Bridges* case. However, the Texas appellate court also sought to distinguish the *Bridges* case by saying it concerned public affairs, while *Craig* v. *Harney* was concerned only with a private lawsuit.

The United States Supreme Court held that the Texas county court became involved in a public clamor because of the nature of the case, the way it was handled, and the natural public sympathy for a soldier serving overseas, and not because the newspapers printed the story. The townspeople who were reported circulating a petition for a new trial had been stirred by what the court did, not by what the newspaper printed. And the court added, very significantly for the press:

> Whatever might be the responsibility of the group which took the action, those who reported it stand in a different position. Even if the former were guilty of contempt, freedom of the press may not be denied a newspaper which brings their conduct to the public eye.[52]

[50] *Graham* v. *Jones*: *In re Times-Picayune Publishing Co., Inc.,* 7 So. 2d 688, 694–95 (1942).

[51] *Craig* v. *Harney,* 67 Sup. Ct. 1249 (1947).

[52] 67 Sup. Ct. 1249, 1254 (1947).

The court then reiterated and strengthened its statement of principles in the *Bridges* case and ordered the newspaper men discharged.

Craig v. *Harney* is an example of the pattern of newspaper interest in public affairs, for the newspaper rarely takes unilateral action. When a court cites a newspaper for contempt, it merely picks out a principal agency through which opinion is expressed. When the editor cited in the *Shepherd* case—a Missouri case in which the court stood on its inherent powers in punishing for contempt by publication—returned to his home town, he was met at the train by several hundred of his readers who presented him with a purse with which to pay his fine. It would have been difficult to stimulate any public clamor against the court like that which its own decision provoked.[53] There is every hope that when courts suffer unjustly and tolerate indignities rather than infringe on American liberty, they will find warmhearted and generous public support like that given to editors in other circumstances.

The courts have no easy task in fulfilling the mandate of the *Bridges* opinion:

> For the First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[54]

The alternative, however, is suppression like that practiced in *Patterson* v. *Colorado*[55] and *Toledo Newspaper Co.* v. *United States*,[56] where judges either sunk in politics or beguiled by tyranny cast American political principles away under the impression that they were doing the thing most likely to preserve them.

SUMMARY

The question of a court's power to punish summarily for publications out of court goes back to principles developed in the courts of both the United States and England. But the American Revolution is given too little weight, and the English common law too much, in determining exactly how the American principles of liberty are and ought to be conditioned by the judicial power summarily applied.

[53]The case is reported at 177 Mo. 205 (1903).
[54]314 U.S. 252, 263 (1941).
[55]205 U. S. 454 (1907).
[56]247 U.S. 402 (1918).

Excesses in the use of summary powers early in the history of the United States established, in both state and federal courts, statutory inhibitions against attachments for constructive contempt by publication. But this genuinely American interpretation of the contempt power withered during the Civil War, and in its place arose the doctrine that any publication was contemptuous which was held to have a reasonable tendency to interfere with the processes of justice.

The sharp curtailment of liberty of expression was confined to cases pending, or adjudged to be pending, in the courts. The importance of the distinction between a closed and a pending case led to many strained interpretations of purely technical matters, and the United States Supreme Court uniformly upheld state determinations of such points on appeal.

The decision of the United States Supreme Court in *Patterson* v. *Colorado* in 1907 strengthened harsh use of summary attachments in the state courts while affording no review of the case on its constitutional merits. The same philosophy was infused into the federal courts by *Toledo Newspaper Co.* v. *United States* in 1918.

However, the *Toledo* case was never a popular or generally respected decision, and its author, Chief Justice Edward D. White, was criticized for the shallowness of his legal research as well as for his narrow view of American liberty. The dissent of Justice Holmes laid down a platform for liberal revolt which was realized finally, in part, in Justice Douglas' opinion in *Nye* v. *United States* in 1941. The *Nye* decision destroyed the causal meaning of the phrase "so near thereto" in Section 268 of the Judicial Code and overruled the *Toledo* decision, taking the courts back to the original interpretation of the statute of 1831. This limited summary contempt to misbehavior in the presence of the court.

The complete revitalization of the early American doctrine of constructive contempts also occurred in 1941 when the Supreme Court of the United States reviewed two California decisions in cases instigated by the bar association of that state. These, the *Bridges* and *Times-Mirror* cases, not only carried out the promise of the *Nye* opinion but applied the test now common to questions of the limitation of expression, the clear and present danger test first used in the *Schenck* case. The *Bridges* case gave the Supreme Court its first real opportunity to apply the sanctions of the First Amendment against a state court contempt order under the due process clause of the Fourteenth Amendment. It utilized this opportunity to state in ringing terms that the First Amendment "must be taken as a command

of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

State court decisions since *Bridges* demonstrate the success of the clear and present danger formula in liberalizing the use of the summary contempt process, and they promise for the courts public acclaim and public understanding long denied by the unfavorable reaction to the alien principle of a judge sitting in his own case without a jury.

CHAPTER III

Labor's Freedom to Picket

A NATIONAL LABOR POLICY IS DEVELOPED

THE traditional symbol of a labor dispute is a picket, carrying a banner, pacing back and forth at the entrance to an employer's place of business. The banner often proclaims the employer "unfair" and bears the name of the labor union carrying on a protest against policies it dislikes. These printed words, as we shall see, link the picket with the pamphleteer and account for his place in a discussion of freedoms guaranteed by the Constitution.

A union putting out picket lines seeks to damage the business of the employer to the point where he will deem it a better bargain to deal with labor on its own terms than to attempt to do business without union cooperation.

Until the Wagner Act of 1935 and *Senn* v. *Tile Layers Protective Union* in 1937,[1] the courts tended to treat the act of peaceful picketing as a common-law tort which, in the absence of legal justification, was to be enjoined. Deprived by court order of its right to publicize its grievances in an effective way, the union usually found difficulty in making its bargaining power equal to that of the employer. For the picket line is associated with one of the strongest taboos of an industrial society, and even two unions fighting each other for the privilege of representing workers on a job have been known to respect rival picket lines.

The records of the cases which have made modern labor history show that a picket line stops not only members of a complaining union, but often all other union workers and applicants for work as well. A business firm conducting an argument with a union thus finds itself forced to suspend operations or to rely on nonunion personnel to serve its customers and to bring in current shipments of merchandise from the outside. Critics of the labor movement point, also, to the possibility of violence as an additional means of enforcing respect for picket lines.

[1] 301 U.S. 468 (1937).

Even when an effort is made to continue operations, the picket line often stops so many potential customers that business operations become unprofitable. Before 1932 business firms so affected found ready relief in the courts from a situation clearly intolerable under the freedom-of-trade concept of the common law. Since the environment of the upper middle class helped to shape the mind of the American judge, and since labor sometimes belonged to that traditional foe of property, the great unwashed, the power and majesty of the American courts for long were arrayed against the picket and the pressure he exerted on a reluctant employer.

A new national labor policy, expressed in the Norris-LaGuardia Anti-Injunction Act of 1932, the Wagner Act, and similar legislation by heavily industrialized states, as well as in ruling opinions by state and United States appellate courts, was required to give unions the right of peaceful picketing—a right which seems all along to have been theirs under the Constitution. But the weight of court precedent based on the law of torts was such that peaceful picketing had to become a ward of the Supreme Court of the United States under the First and the Fourteenth amendments before either state or federal practice was brought reasonably into harmony with the policy expressed by the Wagner Act.

Picketing Used in Competition for Work

Justice Louis D. Brandeis wrote the first chapter of the new constitutional history of picketing in the *Senn* case. Senn was an independent nonunion tile layer whom the union picketed because he would not agree to confine himself to contracting and hire union workers to lay tile for him. His annual income was only about fifteen hundred dollars, and the contract offered by the union was obviously an impossible bargain for him, since only seven hundred dollars of his earnings came from operations in which he was a contractor.

The Wisconsin statute, following the pattern of the Norris-LaGuardia Act, specifically legalized peaceful picketing and denied jurisdiction to courts to enjoin such picketing. Moreover, this act of picketing was not a single and isolated one, nor was it directed maliciously at Senn. It was part of a concerted information program by which a union struggling with significant unemployment among its members frankly undertook to win public support for union standards and union workmen. It was not Senn, as an individual, who was the object of the union denunciation, but Senn and many others like

him who dabbled in contracting sufficiently to keep the wages and working conditions of tile layers a factor in business competition.

The question Senn presented to the court, as described by Justice Brandeis,[2] was whether the statute "as applied to the facts found" violated his liberty and property rights under the Fourteenth Amendment. Senn contended that the union act had the effect of denying him the right to work with his own hands and that this right was one found in the Constitution. Of course, if Senn were denied this right by the act of union pickets, it was because the general public, possessed of freedom of choice after being apprised of the facts of the labor dispute, chose to employ tile layers who were union members.

Said Justice Brandeis:

> Clearly the means which the statute authorizes—picketing and publicity —are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.[3]

Senn's recourse, in this view, was not to the Constitution but to a public information campaign of his own. What the union was doing, he could do, and the public could take its choice of social ends to be gained by awarding work to one or the other or both. The contract which the union asked him to sign was not "arbitrary or capricious, but a reasonable rule. . . . There was no violence, no force was applied, no molestation or interference, no coercion. There was only the persuasion incident to publicity."[4]

The constitutional right of freedom of speech and press seems to have been associated with a labor dispute for the first time in the *Senn* case. The association did not prove to be a comfortable one, for just as speech in its controversial aspects can overflow into the excesses of vilification, exaggeration, and threat, picketing overflows on occasion into coercion, intimidation, and violence. The kinship of the two forms of expression may be emphasized, rather than denied, by the excesses they have in common, though violence seems more easily induced by picketing, which involves face-to-face contact, than by speech or print.

Three years later, the United States Supreme Court elaborated the Brandeis doctrine in *Thornhill* v. *Alabama*[5] and thereafter began,

[2] *Ibid.*, 477.
[3] *Ibid.*, 478.
[4] *Ibid.*, 480–81.
[5] 310 U.S. 88 (1940).

in common with lower courts, the task of defining the limitations to which peaceful picketing, like freedom of speech and press, must be subject.

In the interim several state courts followed the pattern of the *Senn* decision, and the idea that picketing was associated with free speech developed considerable strength. The appellate court of Illinois, second division, first district, emphasized labor's right to present its case to the public in *Schuster* v. *International Association of Machinists,*[6] and pointed to the constant attacks on labor by employers and employers' associations.

This case, like some others reaching the appellate courts in the formative period of national policy, presented a conflict between an employer whose employees seemed well satisfied with nonunion status and a union seeking to organize a craft to protect all such workers in a sizable labor market. The court remarked that unions had been upheld repeatedly in publicizing their charges of unfairness through official organs, newspapers, pamphlets, circulars, and radio, and asserted that equal privileges should apply to peaceful picketing. It also emphasized that labor unions were often unable to afford the costly means of publicity available to their business antagonists.[7] A similar regard for free speech caused the Colorado supreme court to invalidate a comprehensive anti-picketing statute, which it described as violating the due-process provisions of the Fourteenth Amendment.[8] The same considerations, it was said, prevented the restriction of picketing by law to the employee-employer relationship, for the guarantee of freedom of speech was not regarded as less important than the guarantee relating to property.[9]

An ordinance of the city of Reno, Nevada, one of many by which municipal police powers were extended to curb labor union activity, was invalidated by the Nevada supreme court, although a similar ordinance of Indianapolis had been sustained by the Indiana supreme court.[10] The Nevada court said that it regarded peaceful picketing as lawful. "If the methods adopted do not intimidate or coerce, and are without violence, they are lawful. When they involve abuse, violence, intimidation, or coercion, they are unlawful." A substantial loss of business was held no justification for restraint, for "the plaintiff had no vested property right in the business so lost to it."[11]

[6] *Ibid.*, 50, 57.
[7] *Ibid.*, 50, 57.
[8] *People* v. *Harris*, 91 P. 2d 989 (1939).
[9] *Ibid.*, 993–94.
[10] *City of Reno* v. *Second Judicial Court*, 95 P. 2d 994, 995, 997 (1939).
[11] *Ibid.*, 999.

In *Thornhill* v. *Alabama,* in 1940, the United States Supreme Court proclaimed as the law of the land that picketing was a form of expression protected by the First and the Fourteenth amendments.[12] It produced not only a struggle within the court to define precisely the application of the *Thornhill* doctrine, but also a turning point in the legal game being played by some of the states to devise a labor control law which would be out of the reach of federal nullification. In the end, it became apparent that the United States Supreme Court was willing to call picketing free speech in order to obtain speedy jurisdictional access to cases it believed deserving of examination for the constitutional question, but that less than a majority was willing to enforce the broad protection for picketing implied by the free press association.

Picketing Protected as Freedom of Press

The Alabama statute was intended to prevent all picketing, and in that respect it was quite similar to statutes previously overturned by the Illinois, Nevada, and Colorado courts. Under this statute Thornhill was prosecuted for the simple act of serving as a picket during a strike and for advising a nonunion worker not to report for work. Although his acts and words were admittedly peaceful, his mission was opposed to the interests of the men who made law in Alabama, and he was branded a criminal.

Justice Murphy's opinion freeing Thornhill and classing his antagonists as bald licensers of freedom of expression is a penetrating philosophical document in the modern history of industrial democracy. Since his opinion applied to a comprehensive statute flatly forbidding picketing, he held for the court that it was void on several counts. But the opinion applied only to the sweeping form of statute there encountered, and the condemnation itself was couched in such general terms that many courts and individuals friendly to labor were misled as to its scope.

Justice Murphy remarked that the health of our society depended upon the power of free and fearless "reasoning and communication of ideas to discover and spread political and economic truth."[13] When officials were armed with sweeping power, as under the Alabama statute, to prevent free expression, not only did their interference interrupt the processes of democratic education, but the prospect of continued interference served effectively to censor and consequently

[12] 310 U.S. 88 (1940).
[13] *Ibid.,* 95.

to license both the forms and the ideas of those who would express themselves publicly.

And the mere existence of this power, aside from any proof of its abuse, was sufficient ground for holding it unconstitutional, Justice Murphy said.

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.[14]

The statute was, moreover, void on its face. At the very least, the justice wrote, the Constitution permitted public and truthful discussion of all matters of public concern "without previous restraint or fear of subsequent punishment. . . . In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution."[15]

Justice Murphy then applied the test for clear and present danger and found that the "sweeping proscription of freedom of discussion" was not justified by the facts.[16]

Thus not only was the constitutional guarantee applied, but its most stringent test favoring action against property rights was used. Surely this was unreserved classification of picketing as freedom of speech and press.

The supreme court of Oregon applied the *Thornhill* doctrine at its face value in *AFL and CIO* v. *Bain*.[17] The case raised anew the question of what the words "labor dispute" were to mean in Oregon and under the Constitution of the United States as well. When the Norris-LaGuardia Act limited the jurisdiction of the federal courts to enjoin picketing, the opponents of labor found a loophole in definitions of this term. The Oregon legislature had defined "labor dispute" to exist only between an employer and a *majority* of his employees in a "bona fide controversy" pertaining to wages, hours, or working conditions.

Jurisdictional disputes, it will be noted, did not qualify under this definition, nor would the union protests in cases like Senn's or Schu-

[14] *Ibid.*, 97, 98.
[15] *Ibid.*, 101, 102.
[16] A companion case was *Carlson* v. *California*, 310 U.S. 106 (1940). They are commonly cited together.
[17] 106 P. 2d 544 (1940).

ster's. The effective use of the union picket in a campaign to organize a firm or an industry would thus be impossible.[18]

Freedom of speech and press are not absolute rights, the courts have held, following Justice Story's admonition.[19] That being true, picketing is at least equally vulnerable, it was reasoned, and opponents of labor in this case urged the Oregon court to agree. It did not do so at this time, but application of the free press doctrine to less pacific instances of picketing soon produced the desired distinctions and limitations through the opinions of the same court which approved *Thornhill.* The application of the legal methodology peculiar to a case raising the question of fundamental rights and liberties gave the Oregon court reason to "examine the effect of the challenged legislation . . . to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."[20] When this test is applied to the Oregon statute, that law is found to strike with particular violence at craft unions of the AFL type and to favor industrial organizations. A craft union often comprises less than a majority of the employees of a plant, for the craft union principle was established in the days of free and easy court injunctions and outright legal persecutions of unions, and its success was measured by its ability to bargain irreplaceable skills against facilities available through the courts for breaking strikes.

The Oregon law denying picketing rights to a minority craft union denied a fundamental liberty, the state supreme court held, for the federal Constitution assured this liberty to "every person."[21] Deprivation could not be excused on the pretext that the liberty was preserved to the majority. And the court added that no flat restriction of picketing was necessary

> to punish and prevent violence, breaches of the peace, assault and battery, arson, malicious destruction of property, and the closing of public streets by private individuals. . . . An aroused public opinion and vigorous enforcement of the criminal law, resulting in the prosecution and punishment of scores of labor malefactors, had at least something to do with the cessation of these evils. . . . Many of the unlawful acts . . . had no connection with picketing.[22]

[18]Section 8 (b)(4) of the Taft-Hartley Act may be found to achieve the result here sought.

[19]Joseph Story, *Commentaries on the Constitution of the United States* (Boston: Little, Brown, 1858), Vol. II, pp. 667–69.

[20]This formula was stated by the Supreme Court of the United States in *Schneider* v. *State,* 308 U.S. 147, 161–62 (1939), and repeated when the Alabama statute was up for consideration in the *Thornhill* case, 310 U.S. 88, 96 (1940).

[21]*AFL* v. *Bain,* 106 P. 2d 544, 555 (1940).

[22]*Ibid.,* 555.

Associate Justice George Rossman, separately concurring in the court's opinion, examined the deep implications of the decision with uneasiness, an uneasiness which is important because it evidently existed in the minds of a majority of the United States Supreme Court and was soon to be expressed in the law of the land. Rossman asserted that the Clayton Act, the Norris-LaGuardia Act, and the Wagner Act would have been unnecessary if picketing and freedom of the press were really one and the same thing, and he foresaw basic revisions in concepts of free speech if picketing were unconditionally included.[23] His explanation was that this basic freedom, to which so many other rights were subordinated, heretofore had been "confined almost exclusively to the field of governmental problems, and in order that those problems may be solved without resort to arms, the law gives to freedom of speech the great potency just mentioned, thus making it one of the Brahmans of the law."[24] The justice interpreted the *Thornhill* doctrine as applying only in instances of peaceful picketing for lawful objectives, and showed that the present instances of picketing were blameless when tested by the yardstick of clear and present danger to the state, the employer's danger, if any, being beside the point.[25] The next major case in the Supreme Court perhaps took the thought out of Justice Rossman's mind, though the words came from Justice Frankfurter's pen.

Modification of the Broad Constitutional Protection

Where the supreme court of Oregon approved *Thornhill,* remaining content with Justice Rossman's reasonable and shrewd warning of the problems at hand, the supreme court of Washington, by a six-to-three decision, revolted. Relying heavily on state court opinions[26] in *Meadowmoor* and *Swing*—opinions still to go through the refining processes of the United States Supreme Court—and on its own earlier decision in *Safeway Stores, Inc.,* v. *Retail Clerks Union,*[27] the Washington tribunal held an instance of picketing wholly peaceful in character to be illegal because its purpose was, by an interpretation which lacked Justice Brandeis' social philosophy, unlawful.

Where Justice Brandeis, in the *Senn* case, had upheld a union in its efforts to remove wages and working conditions from the field of

[23]*Ibid.,* 558–59. [24]*Ibid.,* 559.

[25]The best known of the antilabor city ordinances is that of Los Angeles. It restricted picketing to bona fide employees, and more than one picket to each entrance was unlawful; pickets, if perchance there should be more than one doorway, were to keep at least twenty-five feet apart, and the style and content of the banners were closely prescribed. Pickets were not to address passersby. It fell as an abridgment of free speech in *People* v. *Garcia,* 98 P. 2d 265 (1939).

[26]*Shively* v. *Garage Employes Union,* 108 P. 2d 354 (1941).

[27]51 P. 2d 372 (1935).

price competition among employers, the Washington state court nostalgically revived the spirit of *Lochner* v. *New York*:[28]

> What right have the respondents to insist or demand at the threat or cost of *the destruction of the appellant's business, or at all,* that appellant ask, urge, or coerce, directly or indirectly its employees, who are at liberty to do as they please to join respondents' organization?[29]

To do so, the court added, was "to unreasonably interfere with the freedom of the liberty and property rights of contract." The decision meant that although in Oregon the public could have the right of choice in patronizing a store employing nonunion workers, in Washington it was state policy to discourage public information and discussion of such issues, so that the union could not ask its sympathizers for aid in a dispute which Justice Brandeis had, in another connection, described as social in nature, and which the United States Supreme Court had declared to be of public interest.

The six-judge majority asserted that decisions of the United States Supreme Court construing the Norris-LaGuardia Act were not binding on a state court, but Chief Justice Bruce Blake, writing for the minority, replied that the Washington state definition of "labor dispute," limiting state court authority to enjoin picketing, contained the same language as the federal act,[30] "regardless of whether or not the disputants stand in the proximate relation of employer and employee."[31] This language clearly allowed the courts to use wide discretion when asked to stop secondary picketing.

In retrospect, the Washington decision contained nearly all the factors which opposing interpreters of the Constitution were to select as the substance of conflict. It dealt with state court adjudication of a state statute, a subject likely to catch the interest of Justice Felix Frankfurter of the United States Supreme Court, whose record showed concern for and deference to a state policy which undertook to fix the line between individual liberty and property liberty. In this way the justice probably would find himself with the conservatives on the court.

[28] 198 U.S. 45 (1905).

[29] 108 P. 2d 354, 356–57 (1941), quoting with approval the same court's decision in the *Safeway* case, 51 P. 2d 372 (1935).

[30] 108 P. 2d 354, 362 (1941).

[31] For a contrast in "unlawful objectives" of union picketing see *R. H. White Co.* v. *Murphy,* 38 N.E. 2d 685 (1942), and the discussion in *Minnesota Law Review,* Vol. 26, No. 7 (June 1942), pp. 985–86, where it is said: "The courts have shown an understandable desire to protect the employer's business from ruin when he cannot legally comply with the picketers' demands. However, if mere unlawful purpose is enough to justify enjoining the picketing without regard to degree of danger threatened to the state, an indirect method might be presented whereby most minority picketing could be eliminated. . . ." Even if picketing were for an unlawful purpose, it would not necessarily be subject to injunction if treated as freedom of the press.

The *Shively* case also gave new notice that the states were not going to leave an employer to collect his damages from unions in civil actions, but that some of them, at least, were going to seek ways to restore the balance which existed before the Norris-LaGuardia Act upset the common practices so favorable to employers in general. The case also foretold the incipient lameness of the association between picketing and freedom of the press, and the widespread attacks upon it by those who preferred to see picketing situations defined by torts principles.

The narrowing of the *Thornhill* doctrine in the United States Supreme Court began with *Milk Wagon Drivers Union of Chicago* v. *Meadowmoor Dairies, Inc.*,[32] decided on February 10, 1941, and it continued here and in the state courts, as was inevitable once the break was made. *Meadowmoor* was followed by *AFL* v. *Swing*,[33] which Ludwig Teller describes[34] as the high point in the incompatible association. Then came *Hotel and Restaurant Employees' International Alliance* v. *Wisconsin Employment Relations Board*,[35] which pertained only incidentally to the free speech issue because manifestly the union was seeking to cloak a deliberate campaign of violence in the immunity deserved only by peaceful communication. Finally, on March 30, 1942, the court decided the *Ritter* and *Wohl* cases and left freedom of the press and freedom to picket in seemingly separate legal compartments, except for the important matter of jurisdictional access.[36]

New Concepts of the Effects of Violence

Justice Frankfurter, who wrote the *Meadowmoor* decision for the court, demonstrated not only his zealous concern for local policy, as interpreted by the Illinois courts, but also a willingness to drop all constitutional safeguards around picketing for a period of time to be fixed by the court when acts of violence were involved.

Meadowmoor developed out of a tendency, widespread in competitive business and intensified by the payroll taxes of the social security program, to keep as many representatives as possible in the status of independent contractors. In matters of public liability and

[32] 312 U.S. 287 (1941).
[33] 312 U.S. 321 (1941).
[34] "Picketing and Free Speech," *Harvard Law Review*, Vol. 56, No. 2 (October 1942), pp. 180, 189.
[35] 315 U.S. 437 (1942).
[36] *Carpenters and Joiners Union of America, Local No. 213* v. *Ritter's Cafe*, 315 U.S. 722 (1942); *Bakery and Pastry Drivers and Helpers Local No. 802 of the International Brotherhood of Teamsters* v. *Wohl*, 315 U.S. 769 (1942).

workmen's compensation as well as payroll taxes, the contractual relationship offers advantages to management. The dairy in this case was serving many wagon drivers, technically not its employees, who competed for the business of retail stores. This competitive situation did not promote the well-being of the wage earners, and the union tried to organize the drivers and to introduce uniform wage and working conditions, meanwhile picketing retail outlets for Meadowmoor products. It was a provocative situation for union, dairy, and independent vendors, and violence resulted "on a considerable scale," including more than fifty instances of window smashing and the use of explosives to damage the Meadowmoor plant and the plant of another dairy using the vendor system.[37]

It has never been seriously suggested that society should permit acts of violence in connection with picketing or any other constitutional freedom. But this violence was five years in the past when the Illinois supreme court used it as the basis of its instruction to the lower court to ban all picketing, and it was seven years past when the case was decided by Justice Frankfurter and his colleagues. The courts found the union innocent of instituting the violence, but the subjection of picketing to restraint was regarded as necessary to the control of violence by police measures. The United States Supreme Court upheld the order.

Justice Frankfurter suggested that the lower court could reopen at any time the question of whether picketing might be resumed. But this position the court had refused to take when Chief Justice Hughes wrote the decision on another occasion when a state court had undertaken similar surveillance of freedom of the press by injunction, in *Near* v. *Minnesota*.[38] And the opinion insisted that the court had not abandoned or qualified the *Thornhill* and *Carlson* decisions. "We affirm them," said Justice Frankfurter.[39] Nevertheless, the affirmation and the decision contain the essence of paradox, and it was thereafter assumed rather widely that picketing be regarded only as a strictly modified form of free expression. Justice Black said as much in his dissent, for the rule, he said, supported "the right of a state to abridge freedom of expression [and] is so general and sweeping in its implications that it opens up broad possibilities for invasion of these constitutional rights."[40]

[37] *Milk Wagon Drivers* v. *Meadowmoor*, 312 U.S. 287, 291–92 (1941).
[38] 283 U.S. 697 (1937).
[39] *Milk Wagon Drivers* v. *Meadowmoor*, 312 U.S. 287, 297.
[40] *Ibid.*, 303. Compare *Emde* v. *San Joaquin Valley Central Labor Union*, 143 P. 2d 20 (1943), where in a similar set of circumstances the appellate court reversed a libel judgment against the union handed down by the lower court on the basis of stories in the union paper.

The argument of the minority, in such a broad invasion of liberty, seemed forlorn indeed when it invoked the clear and present danger test and found the risk to the state insignificant, and when it called for effective police work to suppress misbehavior instead of infringement of the constitutional guarantees.[41]

The extent to which the *Meadowmoor* case turned on the "background of violence" was emphasized by the *Swing* decision on the same day.[42] The court, again in the words of Justice Frankfurter, said that the decree banned both peaceful persuasion and acts of violence, and that the persuasion banned was that by stranger pickets. "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him,"[43] the court decided, and repeated the *Senn* case rule of Justice Brandeis, that workers have a constitutional right to publicize the facts of a dispute.

Interdependence of Economic Interest

A year after the nation's highest court had left *Meadowmoor* and *Swing* for the lower courts to interpret and apply, *Carpenters and Joiners Union* v. *Ritter's Cafe*[44] and *Bakery and Pastry Drivers* v. *Wohl*[45] were decided. Both contained reasoning which further weakened the association of picketing with freedom of the press.

Ritter was a cafe proprietor evidently getting more than half his revenue from persons sympathetic with union labor. He decided to erect a building a mile and a half from his restaurant for an unrelated business. The contractor he selected employed nonunion labor, and the Houston carpenters' union started picketing Ritter's cafe with this banner:

> The owner of this cafe has awarded a contract to erect a building to W. A. Plaster, who is unfair to Carpenters and Joiners Union of America, Local No. 213 and Painters' Local No. 130, affiliated with American Federation of Labor.

When the banner appeared, the restaurant workers' union called

[41] As criticism of the majority opinion, the remark of Justice Black that the state court did not decide the case in the first place on the point of preventing violence deserved to be linked with the expressed fear that the civil rights of thousands "are placed 'at the mercy of a few hotheads' and any provocateurs that an employer may find it desirable to hire." *Columbia Law Review*, Vol. 41, No. 4 (April 1941), p. 730.

[42] *AFL* v. *Swing*, 312 U.S. 321 (1941).

[43] *Ibid.*, 326.

[44] 315 U.S. 722 (1942).

[45] 315 U.S. 769 (1942).

a strike, truckers refused to deliver goods, and Ritter's business dropped 60 per cent.[46] In spite of this evidence of public sympathy for the unions involved, Ritter went to court to stop the constant reiteration of his labor employment policy in the place where his customers were most likely to see and heed the record. He secured the desired assistance when the Texas courts applied the state's antitrust laws, and the union took the case to the United States Supreme Court, claiming violation of its members' rights under the First and Fourteenth amendments. The decision against the union further weakened the association of picketing and freedom of speech.[47]

The court held that Texas had not violated the essential attributes of liberty in deciding that unions may not bring their full weight to bear against a business not connected with the dispute.[48] As violence, seven years in the past, had been used to distinguish *Meadowmoor* from *Thornhill,* absence of "interdependence of economic interest" was used here to deny to the union freedom to carry its banners. Ritter might transfer money from his right-hand pocket to his left-hand pocket and thus escape the full weight of union pressure. The court said the union had at its disposal other traditional modes of communication, but Justices Black, Douglas, and Murphy reminded the majority that this had been branded insufficient excuse in *Schneider* v. *State,* and Justice Reed, separately dissenting, showed that the circle drawn for Ritter had been considered unconstitutional in *Swing.*[49] Reed was thereby urging his colleague, Frankfurter, to check his mental compass on the chance that he might be traveling an illogical path. If he were, however, it was obviously the direction in which a majority of the court wanted to travel.

The *Wohl* case,[50] decided with *Ritter,* was another economic by-product of the government's security program, specifically the Fair Labor Standards Act of 1938. This law expressed the government policy to shorten the work week by requiring overtime pay, which tended to increase employment, and to place a modest minimum on wages. Truck drivers distributing baked goods in New York commonly worked in excess of these hours, and in many ways they fitted the definition of "independent contractor" devised by the administrator of the wage and hour law. Consequently, there was consider-

[46] 315 U.S. 722, 723 (1942).

[47] The term "free speech" is used loosely here, and generally in legal literature, to cover both print and speech. See 16 *Corpus Juris Secundum* 628, Sec. 213.

[48] 315 U.S. 722, 726 (1942).

[49] *Ibid.,* 732, 735.

[50] *Bakery and Pastry Drivers and Helpers Local 802* v. *Wohl,* 315 U.S. 769 (1942).

able shift of these drivers from the employee class to the independent peddler class.

The spokesmen of the teamsters' union told the court that they had lost more than one hundred and fifty members by such shifts, and that the number of independent peddlers had risen from about fifty to more than five hundred. In an effort to stabilize the situation, the union went out to organize the peddlers, among whom were Wohl and Platzman. Wohl tried to cooperate with the union by working six days a week and hiring a union man for the seventh day, but his volume was small and he had to discontinue this plan after ten weeks. The union, with a banner truthfully stating the situation, then picketed the bakery which sold to both men.[51]

The Supreme Court held that freedom of speech did not permit restricting speech to the kind of situation defined by the state court as a "labor dispute" and upheld the picketing, emphasizing its peacefulness. The court also emphasized its lack of success and its slight repercussion (if any) upon the interests of strangers to the issue. In a concurring opinion, Justice Douglas objected that such reasoning tried to cover a seeming departure from *Thornhill*. It implied, he said, that picketing would be illegal here if it forced the employer to settle and legal only when it failed. Black and Murphy joined his protest against the ambiguity of the court's opinion. Failure to clear up the point favorably to freedom of speech and press must be regarded as further weakening constitutional safeguards around peaceful picketing.

The net effect of the series of decisions interpreting *Thornhill* was to leave peaceful picketing its identification with freedom of speech and press for jurisdictional purposes and its identification with the law of torts for delineation of the limitations which, to a greater or lesser degree, are read into all liberties when conflicts must be settled between them. It is obvious that the court met a new problem with pragmatic improvisation and thereby created a new entity in the law. Picketing is *sui generis*.[52]

This conclusion is strengthened by the import of several cases

[51] *Ibid.*, 769, 770–71.

[52] See Ludwig Teller, "Picketing and Free Speech," *Harvard Law Review*, Vol. 56, No. 2 (October 1942), p. 180, and Ira Schlusselberg, "The Free Speech Safeguard for Labor Picketing," *Kentucky Law Journal*, Vol. 33, No. 4 (May 1945), p. 256, and Vol. 34, No. 1 (November 1945), p. 3. A different approach is seen in E. Merrick Dodd, "Picketing and Free Speech: A Dissent," *Harvard Law Review*, Vol. 56, No. 4 (January 1943), p. 513. The social responsibilities of union representatives in the light of this new grant of freedom are presented by T. Richard Witmer, "Civil Liberties and the Trade Union," *Yale Law Journal*, Vol. 50, No. 4 (February 1941), p. 621.

decided since *Wohl* and *Ritter*. The United States Supreme Court upheld an order of the Wisconsin Employment Relations Board forbidding picketing of employees' homes and mass picketing at a plant.[53] Violence was the distinguishing factor in this latter variant of picketing, and because the state acted to preserve order the court held that its action did not conflict with the National Labor Relations Act.

An instance of false information conveyed by union banners resulted in equitable relief despite the contention that the court should not grant an injunction against the publication of libel or slander.[54] The California court concerned held that the expression was a means of committing a tort and thus was subject to restraint. Again, the danger to an employer was given priority over the clear and present danger formula of constitutional cases where danger to the state was the consideration and damage to the employer was something to be decided by a jury.[55] When the courts could find the substance of coercion, or even the shadow, they did not hesitate to enjoin expressions which might better have been submitted to a jury.

State Decisions Further Restrain Labor

A West Virginia decision interpreted *AFL* v. *Swing* as holding legal an instance of picketing which tended to bring the breach of a *labor* contract.[56] The lower court opinion had banned picketing and even enjoined publication of notices in newspapers which would have had the effect of picketing. Both these points in the decree were set aside by the supreme court of appeals of West Virginia, the latter, however, on a technicality and not on constitutional grounds.

A jurisdictional dispute between AFL and CIO woodworkers' unions in Oregon brought an injunction after the state and national anti-injunction laws had been distinguished.[57] CIO members on the job, a minority, had been fired and started picketing after the AFL signed a closed-shop contract. The rival union members wouldn't cross the line, and a plant essential to military operations had to shut down. The court held the contract valid and restrained the CIO pickets, but the action was taken on the narrow points in state law

[53] *Allen-Bradley Local No. 1111, United Electrical Radio & Machine Workers of America* v. *Wisconsin Employment Relations Board*, 315 U.S. 740 (1942).

[54] *Magill Brothers, Inc.* v. *Building Service Employees' International Union*, 127 P. 2d 542 (1942).

[55] See *Minnesota Law Review*, Vol. 27, No. 2 (January 1943), pp. 187, 188.

[56] *Blossom Dairy Co.* v. *International Brotherhood of Teamsters*, 23 S.E. 2d 645 (1942).

[57] *Markham & Callow, Inc.*, v. *International Woodworkers of America, Lumber and Sawmill Workers Union*, 135 P. 2d 727.

and is not regarded as having any other application.[58] When a strike for a closed shop was illegal, as in Massachusetts, picketing for such a purpose was denied constitutional protection.[59] And an order of the Wisconsin Employment Relations Board which stopped a high-pressured union organizing campaign with coercive and violent aspects was enforced by the state courts and allowed to stand by the United States Supreme Court.[60]

While peaceful persuasion to join a union and join in its lawful activities is permissible, concerted action by unions may be exerted only for lawful purposes. When such action is exerted for an unlawful purpose, the free speech provision affords no protection.[61]

Cafeteria Employees Union v. *Angelos*[62] was decided under the rule in *Senn* v. *Tile Layers Union* and *AFL* v. *Swing*. Like *Senn* it contained the dramatic element of a union forcing its policies on a small business, in this instance a cafeteria owned by its employee-operators.[63] A similar ruling by the supreme court of Indiana disposed of *Retail Clerks Union* v. *Peaker*, in which Peaker, a grocer with six employees who did not want to join a union, was denied relief against picketing.[64] And the Minnesota supreme court refused an injunction to a tinsmith who was picketed when he started work on a residence he was building for sale. The object of the picketing was to force the tinsmith to stop furnace installation work and contract with employers of union labor. The court said:

> The theory of the later cases is that work is a legitimate subject of economic competition and that employees may use peaceful means in such competition to obtain work and job security.[65]

In New York the appellate division of the supreme court issued a temporary restraining order against pickets who falsely identified themselves as representatives of a union. The court ruled that be-

[58]Compare 164 P. 2d 662 (1945) where there was no contract.

[59]*Fashioncraft* v. *Halpern*, 48 N.E. 2d 1 (1943). Since the closed shop was disavowed as national policy under the Taft-Hartley Act, picketing rights will need reinterpretation at this point under federal law.

[60]*Christoffel* v. *Wisconsin Employment Relations Board*, 10 N.W. 2d 197, cert. den. 320 U.S. 776 (1943).

[61]*Ibid.*, 206.

[62]320 U.S. 293 (1943).

[63]Said the *Michigan Law Review*, Vol. 42, No. 4 (February 1944), p. 706, published by Justice Murphy's alma mater, "The conclusion seems to have been based upon the ground that the action of the state court amounted to a denial of free speech. . . . This must be the law for the highest court in the land without dissent says that it is. However, if that be true, then the law is even worse than what Bumble said it was." Said Bumble (*Oliver Twist*, Chapter 51): "If the law supposes that . . . the law is a ass—a idiot."

[64]51 N.E. 2d 628 (1943).

[65]*Glover* v. *Minneapolis Building Trades Council*, 10 N.W. 2d 481, 484 (1943).

cause the dispute was not covered by the state Civil Practice Act, the pickets were not entitled to immunity on constitutional grounds.[66]

Picketing in Summary

Freedom of speech and press for the American labor union requires the use of a medium new to the usual concepts of constitutional law, a combination of a picket physically close to the union's antagonist and a banner inviting the general public to join the union in its demands.

Until the passage of the Clayton Act in 1914, the union principle had faced the combined weight of state and federal courts, because picketing had come under the ban of antitrust laws and the law of torts as well. In the latter category, it had the status of a tort which had to be justified to the satisfaction of the court. Common-law standards placed the labor movement in the hands of judges who made and enforced their own law, while the odium of restraint of trade under torts met a more severe set of prohibitions in the Sherman Act as interpreted by the courts.

The Clayton Act was amended upon passage to exempt labor unions, and with this influence and the social consciousness of the judges, the treatment of labor gradually improved. However, in a showdown dispute with a powerful employer, the unions found themselves still on the losing side, because the courts consistently refused to permit picketing. The state laws strengthened the employer's hand and gave the judges statutory reasons for repressive acts where formerly they had required only an excuse.

Investigations in Congress led to the passage of the Norris-LaGuardia anti-injunction act, which at least shortened the repressive reach of federal district courts in their handling of labor matters, and the depression beginning in 1929–30 paved the way for the New Deal era. The Roosevelt administration sponsored the Wagner Act and the Fair Labor Standards Act, both of which took labor's side against harsh exploitation. The Wagner Act created a federal tribunal, the National Labor Relations Board, to protect the worker in his self-organization and collective bargaining. Under the protection of the new charter, labor organizations reached into every corner of the land, and the picket's banner became as familiar a sight as railroad-crossing markers. But under the state courts, the picket continued to be treated as a trespasser who had to prove his rights and his provocation.

[66] *Carrock* v. *Amalgamated Meat Cutters and Allied Market Employees Local 63*, 44 N. Y. S. 2d 894 (1943).

The suppression of picketing, in its harsher aspects, had long since begun to dissolve, but in 1937 Justice Brandeis said that picketing was a constitutional right which workers might exercise without special permission, and three years later the United States Supreme Court fully indorsed the Brandeis formula.

Picketing is a volatile and vigorous form of expression, and constitutional protection aroused its enemies to new efforts. As the law of libel has limited freedom of the press, the law of picketing was developed by the courts as a series of limitations on the basic right of peaceful picketing. The state and federal law restricted picketing to instances defined as labor disputes, and the statutes left many occasions for the use of pickets outside the definition and thus subject to injunction. Decisions of the United States Supreme Court which set aside efforts to apply the term so as to limit labor's power to the master-servant relationship, thus destroying secondary and sympathetic efforts of labor and public as a whole in behalf of labor in its local-union aspects, were, in this way, given narrow application.

State antitrust laws were successfully applied to confine labor disputes—and therefore picketing—to the area of "interdependence of economic interest." And laws which brought labor unions and their employees into the sometimes unmotherly embrace of the state's regulatory powers were upheld, though their infringement of freedom of speech and press was not to be tolerated. The main import of the regulatory laws was still to be learned, because the laws were new and the courts had hardly begun the task of applying them to specific situations.

The decisions of the United States Supreme Court gave it supervisory power over the development of specific applications of all labor control laws through the formula by which picketing was declared a constitutional right. Reasonable regulation was to be allowed to proceed in accordance with the needs of a democratic society, but the harsher aspects of old-time repression were to be avoided by the opportunity to raise the constitutional question at any time in a federal court.

PATTERN OF STATE REGULATION OF UNIONS

These limitations on picketing were minor when measured against the great gains from the legislation of 1932, 1935, and 1938, though the 1947 act has left their true extent in doubt. Opponents of the labor advance, checkmated in part in the effort to suppress picketing, had turned to state antitrust laws, as in *Ritter,* and to extensive

regulatory programs. The laws in many states are similar because American legislators are accustomed to looking around for an established law which expresses their own thoughts.[67] Labor union organizers and union business agents are the key men in the labor movement, for they start unionization and keep it going. The state laws established partly in reaction against the policies of the Wagner Act and the National Labor Relations Board classified the occupations of organizer and business agent and subjected them to regulation and license. Some other standard features required the filing of lists of officers of local, state, and national departments of a union, the filing of constitution and bylaws, the keeping of elaborate financial records and the making of financial statements. Intra-union affairs occasionally were regulated by setting up qualifications of those eligible to office, and by dictating bylaws of locals in part on the premise of obtaining greater assurance of democratic procedures.[68] Some of these regulations were eventually taken up by Congress and became federal law, also.

Hopes for clarification of the Florida and Alabama laws, which arose when the supreme court granted certiorari to review them, proved groundless, for the court said it would not undertake to interpret the possible effect of these laws on civil liberty until the state courts had so interpreted them as to curtail freedom.[69] The Florida case called for interpretation of the anti-closed-shop amendment to the state constitution. These state and federal acts will long be in the courts for the settlement of liberty issues.

The *Ritter* case demonstrated the application of state antitrust laws to the end of controlling picketing, and a straightforward application of the antitrust principle faced the supreme court of Michigan in *Harper* v. *Brennan*.[70] A teamsters' union had contracts with all funeral directors' supply houses in an area of Michigan and, using this degree of control as leverage, had unionized the funeral directors' employees too, along with casket companies, wholesale florists, many retail florists, and hearse rental agencies.

When Harper dropped out of the union, he found himself not only picketed but also isolated by union barriers which cut off his supplies and equipment. The Michigan court leaned upon *Ritter*

[67]Some of the kindred sections are compared in *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (1945) by a three-judge court which considered the Kansas law regulating unions.

[68]See *AFL* v. *Mann*, 188 S.W. 2d 276 (1945), a Texas case analyzing that state's labor control law.

[69]*Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 472 (1945); *CIO* v. *McAdory*, 325 U.S. 472; *AFL* v. *J. Tom Watson*, 327 U.S. 582 (1946).

[70]18 N.W. 2d 905 (1945).

for assurance that peaceful picketing is not immune to regulations that will protect the public "despite its privileged status under the Constitution," and found the objective of the union picketing to be unlawful monopoly.[71]

The persistence of legal efforts to narrow the meaning of the term "labor dispute" was evident in a separate concurring opinion by three justices. They applied the "unity of interest test" to the circumstances and concluded that no labor dispute existed between Harper and the union. The unity of interest test permits picketing upon occasion where a primary relationship, satisfactory to the courts, can be established between the firm involved in a labor dispute and the third party or parties being picketed for the sake of creating economic pressures. Picketing is enjoinable when bannering of a third party can have a very indirect effect, if any, upon the employer involved in the labor dispute.

Picketing may or may not be enjoinable, depending upon the evidence, if effective means other than stranger picketing are available to the employees. But ineffectiveness of pressure against one point in a unified field of interest may be found by the courts to justify picketing of another point, even though it be one apparently stranger to the dispute.

In considering an application for injunction, the courts consider whether the employees are singling out one third party arbitrarily while "not subjecting other persons similarly situated to the same treatment."[72]

The Regulation of Labor Organizers

R. J. Thomas, then president of United Automobile Workers (CIO), challenged the Texas law by appearing personally before a group of workers in defiance of a restraining order issued under the law. He asked the crowd collectively to join labor unions and to support the labor movement, and, evidently under the guidance of his attorneys, addressed a like invitation to specific individuals.

In so doing he expected to qualify as a labor organizer of the sort subjected to license and regulation by the law, and the Texas court of local jurisdiction had enjoined such action on his part. The United States Supreme Court held that the Texas law, when applied in this fashion to restrain speech in advance, was unconstitutional.[73]

[71] *Ibid.*, 908.

[72] Anonymous, "Freedom of Speech in Secondary Picketing," *Yale Law Journal*, Vol. 51 (May 1942), p. 1209, note on p. 1211.

[73] *Thomas* v. *Collins*, 323 U.S. 516 (1945).

The injunction was issued because Thomas had neglected to comply with that part of the law which required labor union organizers to register with the secretary of state and procure an organizer's identification card, and in response to a petition issued in anticipation of his speech.[74] Thomas was sentenced to three days in jail and fined one hundred dollars. The Texas court called the law a valid exercise of the state's police power, taken "for the protection of the general welfare of the public, and particularly the laboring classes."

The Texas officials argued that Thomas could have made his speech without inviting his hearers to join the union and thus could have avoided violating the law. If enforced in that way, the effect of the law would not have been to eliminate any "solicitation" as defined by Texas from the category of constitutionally protected speech but merely to require registration of labor union organizers. A second effort of the same kind sought to ignore the general solicitation of the crowd and to urge conviction solely upon the individual solicitations of membership which Thomas made. If successful, this device would have removed Thomas' words from their context and made room for conviction.[75]

Justice Wiley Rutledge, in the majority opinion, described the issue as one of deciding

> where the individual's freedom ends and the power of the state begins. . . . For these reasons any attempt to restrict these liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. . . . It is therefore our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when this right is exercised in conjunction with peaceable assembly.[76]

Having upheld Thomas' right to speak, the court then rejected the licensing feature inherent in the provision requiring registration as a union agent before calling and addressing a public meeting: "Peaceable assembly for lawful discussion cannot be made a crime." Approval for the special classification of union organizers, however, was present in connection with this assurance of immunity, for Justice Rutledge told Thomas that once a speaker "engages in conduct which amounts to more than the right of free discussion comprehends, as when he undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed."[77]

[74] *Ibid*., 521.
[75] *Ibid*., 526–28.
[76] *Ibid*., 529–30.
[77] *Ibid*., 540.

The minority, Justices Roberts, Reed, and Frankfurter, saw in the Texas law nothing more than the usual police power regulation for public safety. They emphasized particularly that the law applied only to professional organizers, exempting the rank and file of workingmen from requirements of the act and leaving them to solicit without prior registration and without regulation of time and place.

"I think," said Justice Roberts, "that if anyone pursues solicitation as a business for profit, of members for any organization, religious, secular, or business, his calling does not bar the state from requiring him to identify himself as what he is—a paid solicitor."[78] At least two courts have construed the Supreme Court's opinion to have this meaning.[79]

Hill v. *Florida* considered a regulation of union agents which stated their qualifications for office.[80] Conflict with the First and Fourteenth amendments was minimized by this treatment, but the field already had been pre-empted by the Wagner Act which, until amended in 1947, gave union members a free hand in picking their representatives. The court noted, through Justice Black's opinion, that the National Labor Relations Board had consequently told employers to bargain with agents properly selected under the Wagner Act who could not secure a Florida license.[81] This conflict left the agents vulnerable to contempt citations by a Florida court and liable to misdemeanor charges.

Chief Justice Stone agreed that the federal law should prevail, but insisted on Florida's right to assess criminal sanctions for violations of regulations, and Justice Frankfurter, joined by Justice Roberts, went further in his dissent, asserting that the duties laid on agents by the Florida law did not materially obstruct the exercise of rights conferred by the Wagner Act.

The common provisions written into regulatory acts of several states were uniformly attacked by the unions with this argument: The unions function by using the processes of freedom of speech and press and freedom of assembly, and when any major union function is subjected to licensing or crippling regulation, constitutional considerations ought to rule.

Other Regulatory Provisions Clarified

Many of the legal strings which such laws tied to the labor move-

[78] *Ibid.*, 550, 556–57.

[79] *AFL* v. *Mann*, 188 S.W. 2d 276 (1945), Texas Court of Civil Appeals; *Stapleton* v. *Mitchell*, 60 F. Supp. 51 (1945), Federal District Court for Kansas, First Division.

[80] 65 Sup. Ct. 1373 (1945). [81] *Ibid.*, 1375.

ment were subjected to analysis and decision by the Texas court in the *Mann* case.[82] It offers an adjudication of the points usually not at issue when the cases reached the United States Supreme Court.

Section 5 of the Texas act had been held void in the circumstances in which it was applied to Thomas. The declaratory judgment of the Texas court held the section valid as applied to labor organizers "otherwise than as part of a public speech to assembled employees." Registration of union organizers as a prerequisite to carrying on their business otherwise was therefore approved by the Texas opinion.[83]

A part of Section 3 provided that unions annually should file lists of their local, state, and national officers, complete financial statements, and copy of their constitutions and bylaws. The section was invalidated as lacking a real and "substantial relation to the object sought to be attained" and as "not essential to the operation and enforcement of the . . . act."[84] The effect of this section on freedom of press was not stated, but similar provisions are available for testing in the federal labor act of 1947.

Regulation of fees, dues, fines, and assessments, as revealed by the operations of Section 3, was provided by Section 7, and both sections fell together as interdependent. But the court said that filing of constitutions and bylaws was properly required. Regulation of elections within the union had been undertaken by Section 4, and the trial court had eliminated it; the appellate court approved. Aliens or convicted felons were denied union office by Section 4a. The appellate court passed this one over in the original opinion and was urged to reconsider; in doing so it defined *Truax* v. *Raich*[85] as affecting the right to work while this section touched only the privilege of holding an office.[86] The unions were told they had no special immunity from regulation so long as it did not trespass upon the domains of free speech and free assembly.[87]

A requirement that a union file with the secretary of state any agreement providing for check-off of dues was held invalid as not reasonably related to purposes of the act. Proscription of fees charged nonmembers for work permits, a wartime device which permitted a union to handle the great influx of temporary workers without materially altering its peacetime adjustments to the labor market, was

[82] 188 S.W. 2d 276 (1945).
[83] *Ibid.*, 279–80.
[84] *Ibid.*, 282.
[85] 293 U.S. 33 (1915).
[86] 188 S.W. 2d 276, 286 (1945).
[87] *Ibid.*, 279.

permitted by the court, and the requirement of an adequate system of records was approved along with the regulation of procedures leading to the expulsion of a union member. A hazy section which evidently struck at the closed shop by forcing employment of non-union workers fell both because it was ambiguous and because it had the effect of abrogating valid contracts.[88]

Under the rules of the United States Supreme Court,[89] many of the manifold constitutional questions presented by state and federal labor legislation will be decided, as in *AFL* v. *Mann,* on other grounds, and this case shows the possibilities present in an omnibus attack on regulatory labor laws under the First and Fourteenth amendments.

THE EMPLOYER FIGHTS FOR FREEDOM TOO

The forgotten man in this series of legal developments, by his own admission and claim, was the employer. For a time it seemed that the national labor laws gave his employees all the free speech in the world and at the same time muzzled him completely. According to some employers, they were afraid to say "Good morning" to an employee for fear that if there were an NLRB investigation later on the remark would be introduced in evidence to support a contention that they were sponsoring company unions.

The law gave the federal circuit courts jurisdiction to enforce orders of the NLRB, upon application, but severely restricted those courts to matters of law, leaving inviolate the board's finding of fact. A reading of a case like *Continental Box Co.* v. *NLRB* reveals the extent to which the judges chafed under this restraint while in evident disagreement with the board over its handling of an employer's constitutional rights of free speech and press.[90]

No doubt the NLRB dealt with matters provoking just indignation, but the cases show that its actions tended toward overseverity when its course was turned by the courts and, finally, by the Congress.

The board's order against the Ford Motor Company, for example, contained not only a controversial point on freedom of the press, but also noncontroversial directives to cease discharging and refusing to reinstate employees because of labor union activities and to cease threats, assaults, beatings, and intimidation of union members distributing union literature near the River Rouge plant.[91] Thus the

[88] *Ibid.*, 285-86.
[89] *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936).
[90] 113 F. 2d 93 (1940). See also *NLRB* v. *Federbush, Inc.*, 121 F. 2d 954 (1941).
[91] 114 F. 2d 905 (1940).

board dealt with both the publication and the distribution ends of literature—a constitutional problem.

Judge Learned Hand, one of the great figures in the history of the federal bench, expressed the dilemma of the board and of the courts in July 1941,[92] five months or so before the Supreme Court laid out the national pattern in *NLRB* v. *Virginia Electric and Power Co.*[93]—a pattern adopted by Congress in 1947 in revising the labor laws. Judge Hand remarked that society's interest in the preservation of free speech ended at the point where speech failed to help others to reach an informed judgment about what concerned them:

> Language may serve to enlighten a hearer, although it also betrays the speaker's feelings and desires; but the light it sheds will be in some degree clouded if the hearer is in his power. Arguments by an employer directed to his employees have such an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. . . . All in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part. What to an outsider will be no more than the vigorous presentation of a conviction, to an employee may be the manifestation of a determination which it is not safe to thwart. The board must decide how far the second aspect obliterates the first.[94]

This essentially reasonable platform, when applied and interpreted with the calmness characteristic of Judge Hand, would certainly have been free of constitutional restraints. But when the board came to use its power amid an exhibit of bloody noses and cracked knuckles, it showed a tendency to keep the antagonists apart, regardless of infringements of free speech which might attend the effort.

In his struggle to maintain a labor policy free of interference from an outside union organization, Ford and his associates had literature prepared and distributed hand-to-hand at the River Rouge plant gate. The NLRB tried to eliminate the hand-to-hand distribution, while leaving undisturbed the company's right to prepare literature and put it in boxes at the gates on a take-it-or-leave-it basis. The plan in use, the board declared, had the effect of interference, restraint, or coercion condemned by the statute.[95]

The court, however, could not see a distinction which had seemed valid enough to the board in the cracked-head atmosphere of the

[92] *NLRB* v. *Federbush, Inc.*, 121 F. 2d 954 (1941).
[93] 314 U.S. 469 (1941). [94] 121 F. 2d 954, 957.
[95] *NLRB* v. *Ford Motor Co.*, 114 F. 2d 905, 912–13 (1940).

earlier Ford controversy. It found in the literature the usual spleen belonging to special pleading, and preferred to take a chance on the abuses of freedom in preference to the abuses of suppression and tyranny. The company, however, had convinced the court that it was sincere when it promised that union membership would not be made the basis of discharge or discrimination. And it seemed to the court that the Ford organization was well qualified to discuss the subject and should not be silenced merely because of the risks involved. Anyway, the risks pictured by the board seemed to the court less ominous in view of the drastic change in the master-servant relationship worked by the National Labor Relations Act. The servant no longer had "occasion to fear the master's frown of authority or threats of discrimination for union activities, express or implied." It seemed to the court that the more fundamental right here was free speech, and its order ran accordingly.[96]

The NLRB Invades Freedom of Press

Clarification of the employer's anomalous position came from the United States Supreme Court in *NLRB* v. *Virginia Electric and Power Co.* This concern had an anti-union labor record and, after passage of the Wagner Act, had posted bulletins and had sponsored speeches which were held to be favorable to the organization of an inside union. The NLRB later termed this a company union, ordered the company and union to disestablish it, and directed reinstatement of employees discharged for union activity. The inside union had been given a closed-shop contract with a check-off of dues provision. Also, the board cited the company for unfair labor practices in connection with its bulletin board and oral statements.

The statements to which the board objected were not found per se to threaten or coerce employees or to interfere with their freedom to join a union of their own choice, and the lower court refused to enforce the order at all. Upon appeal to the Supreme Court, the order was sent back to the board with instructions to clarify its reasons for abridging the constitutional rights of the company.[97] The board reopened the case, collected and reported additional evidence, and based its speech-suppression order on the "totality of information and evidence" of the company's compliance with the act.[98] This order,

[96] *Ibid.*, 914. For other examples of court restraint of employers, see *NLRB* v. *New Era Die Co., Inc.*, 118 F. 2d 500 (1941), where management broke the union by threats to close the plant; *NLRB* v. *Luxuray, Inc.*, 123 F. 2d 106 (1941), where workers were told they had better depend on the boss for wage increases and stay out of the union.

[97] *NLRB* v. *Virginia Electric and Power Co.*, 314 U.S. 469, 477, 479 (1941).

[98] 44 NLRB 404 (1942).

almost identical with the first one, went to the Supreme Court on the principal issue of refunding to employees the dues collected for the company union under the check-off clause in the contract.[99] The freedom of speech issue was treated as foreclosed by the amended findings of the board.

Justice Murphy wrote the opinions for the court in these two cases and established a pattern which the board was compelled to follow. If speech or writing by an employer was not clearly threatening or coercive on its face, the board could not ask the courts for an enforcement of what would be a censorship order. But if "in the light of the totality of information and evidence" the speech or writing violated the employees' rights, it could be restrained.

This formula, which, the lower courts found, permitted employers slightly more leeway than the ones previously applied, had the great merit of giving an employer freedom of speech if he kept his words and actions free of coercion. He could express his true feelings about a union (even though in so doing he ran the risk of blistering the paint on the walls of his plant) if he carefully conditioned the criticism by valid assurance that union status would not affect a man's standing with the company. The courts kept in mind, too, both their own ability to protect employees and the good sense of the workers in realizing that an employer's bark could be worse than his bite.

The board itself had to face "cease and desist" treatment from the courts before it finally came to modify its extremist interpretation of an employer's language. The Edward G. Budd Company escaped the censure of the board when the court discharged a show-cause rule based on board charges that utterances by the company had brought it into contempt of court.[100] A previous order had cited the company for unfair labor practices and had dissolved a company union. Although the NLRB charged that the company coerced its employees in explaining the board order, the court could see no coercion. It applied the clear and present danger rule to the effect of the company's utterances on the Wagner Act, and told the board that the right of free speech in the future was not to be forfeited because of misconduct in the past.[101]

J. L. Brandeis & Sons, an Omaha department store, went even fur-

[99] *Virginia Electric and Power Co.* v. *NLRB,* 319 U.S. 533 (1943). The freedom of speech provisions in the Taft-Hartley Act of 1947 followed the pattern marked out by the *Virginia Electric and Power Co.* cases.

[100] 142 F. 2d 922 (1944).

[101] *Ibid.,* 928.

ther than Budd, being less burdened by a record of anti-union activity. In literature and speeches the store told its employees that it could do as much for them as the union because of wartime price and wage control, and that the leaders of the union seeking their confidence were more interested in the sixty-three thousand dollars a year they could get out of Omaha store employees than in anything they could do for the workers. But every act and remark of the company was conditioned by the assurance that no reprisals would be taken against any employee because of his union membership. The NLRB asked enforcement of its cease-and-desist order, but the court declined, saying that the *Virginia Electric and Power Co.* case had freed employers from the pale role of anemic neutrality and required only that they obey the Wagner Act. "The sole statutory test," said the court, "is interference, restraint, or coercion."[102]

Other cases followed this now well-established pattern,[103] with only the case of the Washington, Iowa, Chamber of Commerce offering any novelty.[104] When the board cited the American Pearl Button Company plant in Washington, Iowa, for interference with the rights of its workers to organize, it brought in the chamber under the very broad definition of "employer" contained in the Wagner Act. The chamber, while the unionization drive was under way, had made a survey of wage rates in button plants fairly comparable to the Washington, Iowa, plant and had published the results of the survey in the newspaper, together with comments which the board interpreted as unfavorable.

The court, however, could find no link between the chamber and the company, and the advertisement itself was pronounced clearly "within the area of free discussion as guaranteed by the Constitution." The chamber was exonerated and the order enforced against the company alone.

Coercion and Intimidation Defined

The employer, as a result of this series of cases, enjoys the same constitutional rights of freedom of speech and press as any other citizen, but he must use his rights, when dealing with his employees, in such a way that the courts will believe him innocent of any threat or intimidation or coercion which would violate the national labor laws.

[102] *NLRB* v. *J. L. Brandeis & Sons*, 145 F. 2d 556, 563–66 (1944).

[103] *NLRB* v. *Pick Mfg. Co.*, 135 F. 2d 329 (1943); *Jacksonville Paper Co.* v. *NLRB*, 137 F. 2d 148 (1943); *NLRB* v. *Lettie Lee, Inc.*, 140 F. 2d 243 (1944); *NLRB* v. *M. E. Blatt Co.*, 143 F. 2d 268 (1944).

[104] *NLRB* v. *American Pearl Button Co.*, 149 F. 2d 311 (1945).

While the legal pattern was developing he could not expect the NLRB to read into his words or into his act any large portion of the benefit of the doubt, for it was an agency charged with the militant job of protecting labor's rights, and it devoted itself to its duties with a zeal that for a time had the appearance of bias.

CHAPTER IV

Half Slave and Half Free

THE NEWSPAPERS UNDER NRA

IN 1933 the national government launched its National Recovery Administration with the hope of bringing life back to a country stunned by a major business disaster. All the trappings of a giant pageant attended NRA. Recovery was to be organized on semimilitary lines, with an army general and his drill-sergeant vocabulary directing the show. Business practices were to be purged of cutthroat methods, and a code of fair competition was to be negotiated by interstate industries large and small. A cardinal tenet of each code was Section 7 (a) of the National Industrial Recovery Act, in which Congress prescribed that the codes should assure employees the right of collective bargaining and freedom of choice with respect to labor organizations. Both criminal and psychological sanctions were provided for violations of the codes. Each business participating in the national recovery program was entitled to fly the blue eagle flag, symbol of national teamwork and bearer of the legend: WE DO OUR PART. A firm could be deprived of its blue eagle upon decision of a compliance committee.

Section 4 (b) and the labor provisions were the portions of the program which made history in the newspaper business. Section 4 (b), the so-called licensing section, provided that when the president found destructive wage- or price-cutting or other activities contrary to the act, he was authorized to license enterprises in that industry, and that operation without such a license was to be unlawful. Moreover, after licensing, investigations were to be made, and the president was authorized to suspend or revoke licenses, "and his action shall be final if in accordance with law."

A five hundred dollar fine and a jail term of not more than six months could be assessed against violators of the licensing provision. Violations of the code provisions themselves could be punished, upon conviction, by a fine up to five hundred dollars for each separate

offense. And over all hung the threat of losing the blue eagle and of being branded a chiseler and a semitreasonable American.

The man who seems to have analyzed the law for the American Newspaper Publishers Association, and to have been assigned the task of assembling a set of acceptable standards for the newspaper code, was Elisha Hanson, its general counsel. His task proved to be long and arduous. Before a year was up he had created for his employers a major sensation, centering in fear for freedom of the press, and the famous crossfire between the president and the publishers had begun. The code submitted by ANPA stated:

> Nothing in the adoption and acceptance of this code shall be construed as waiving, abrogating, or modifying any rights secured under the Constitution of the United States or of any state, or limiting the freedom of the press.
>
> It is mutually understood that because of the limitations of the first amendment to the Constitution of the United States nothing in this code shall be construed as authorizing the licensing of publishers and/or newspapers or as permitting injunctive proceedings which would restrain the publication of newspapers.[1]

The ANPA Resists Licensing

The ANPA draft code also exempted "professional persons employed in their profession" from the maximum hours fixed in the code, with the idea of classifying reporters and desk men as "professional persons." The NRA administrator had promised to include these employees under the code. One other stipulation in the draft would have amounted to code protection for the open shop.[2]

The ANPA draft was not acceptable to all newspapers, but most of them stood in line behind the organization's leadership until the code with the desired restrictions was adopted. The Milwaukee *Journal,* for example, was among the critics when it said:

> We cannot see in this anything but a plea for special privilege exactly like the plea which others make under such high-sounding names as "rugged individualism" and "free competition," when in fact they strive, when it is to their advantage, to make competition anything but real and their "individualism" leaves the door of opportunity closed to many. . . .
>
> The position of the newspapers is not in opposition to the Roosevelt program—for others than themselves. But the American Newspaper Publishers Association asks them to plead that they are exempt. Why? "The freedom of the press!"

[1]John W. Perry, "Code For Dailies Filed at Washington: Many Publishers Endorse Regulations," *Editor & Publisher,* Vol. 66, No. 13 (August 12, 1933), p. 3.

[2]*Ibid.*

A newspaper has two characters. In one it is undertaking to print the news as fully as it can get it and as honestly, often adding to this the obligation of commenting on that news as truthfully and as wisely as human weakness permits.

In fulfillment of this duty, a newspaper must fight for freedom of the press with its last breath, and if it lives up to its profession must expire when that freedom is foreclosed.

In its other character a newspaper employs men and women, buys materials, sells its services and its product. We cannot see that in this character it is exempt in any degree from the duty of being a good citizen.[3]

The first National Labor Relations Board was created during NRA operation, too, and the recovery act thus laid the foundation for the Wagner Act as well as the Fair Labor Standards Act of 1938. And in the same week that ANPA announced the draft code which Hanson had worked out for it, Heywood Broun of New York revealed that he was forming an organization that eventually became the American Newspaper Guild.

The dilemma of government in dealing with newspapers under the NRA was whether to exempt them completely and thus create an unfortunate breach in the united front, or to apply the recovery policy without reservation and arouse the suspicions and fears of those who regarded the constitutional guarantee of freedom of the press as infringed thereby.

The dilemma of the newspapers, who were expected to inform and inspire the country and to furnish local and national leadership for recovery, was whether to look at President Roosevelt's broad smile and listen to his calm assurances that freedom of the press was not threatened, or to construe Section 4 (b) literally and to remember that political power benign today may be tyrannical tomorrow and that any time a newspaper puts its fate trustingly into the hand of government it takes a step which history witnesses as unwise.

The press and its freedom immediately become secondary when, in the name of great national objectives, it is impressed into a movement as the servant of the dominant leadership group. The Constitution, accordingly, seeks to force all users of political power to respect the independence of the press, and to make its freedom as great as any national interest.

Colonel McCormick Asks Blanket Immunity

It is less important historically that the final NRA code for the newspapers contained the ANPA "freedom of press" reservation

[3]*Editor & Publisher*, Vol. 66, No. 11 (July 29, 1933), p. 6.

than that the atmosphere of controversy here established was carried over into a long-range national labor policy when it was enacted. The government had assumed that freedom of the press meant only freedom from prior censorship, and that general laws affecting business applied to newspaper publishing regardless of the effect on the ability of the newspapers to operate.

Colonel Robert R. McCormick of the Chicago *Tribune* was among the extremists who held that advertising, as well as news matter, was protected by the First Amendment. And, he asserted, the amendment would be violated by any law which operated so as to

> unreasonably raise the cost of production or unreasonably decrease by indirect means the return from publishing, as these would destroy its freedom as effectively as would excessive taxation.[4]

The United States Supreme Court rejected this argument in both respects. Advertising was flatly denied constitutional protection,[5] and neither the court nor Congress ever looked hard at the question of whether general business laws, such as the Wagner Act and the Fair Labor Standards Act, impaired the financial integrity—and, therefore, the freedom—of the press.[6] Instead, it was assumed that the guarantee did not concern the press as a business at all.

Among the laws which, according to McCormick, infringed the freedom of the press were those by which the Federal Trade Commission was enabled to censor advertising and to hand down cease-and-desist orders, and by which the prior approval of the Securities and Exchange Commission was required for the advertising of securities. He remarked:

> Defeated all along the line in its direct attack on the freedom of the press, bureaucracy has taken to stratagems, fifth columns, and to dropping parachute troops upon press freedom under the guise of regulating labor conditions, preserving business competition, and superintending accuracy in advertising.[7]

Whether or not these things affect freedom of the press depends

[4] "Bureaucracy Is Greatest Threat to Press Freedom," *Editor & Publisher*, Vol. 72, No. 39 (September 28, 1940), p. xiv.

[5] *Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); *San Francisco Shopping News Co.* v. *City of South San Francisco*, 69 F. 2d 879 (1934).

[6] *Associated Press* v. *NLRB*, 301 U.S. 103 (1937); *Giragi* v. *Moore*, 58 P. 2d 1249 and 301 U.S. 670 (1937); *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320 (1940); *Sun Publishing Co.* v. *Walling*, 140 F. 2d 445 (1944); *Mabee et al* v. *White Plains Publishing Co.*, 327 U.S. 178 (1946). The last case virtually ended hope that local daily newspapers with small interstate circulation would be held exempt from the wage-and-hour law unless that law is amended by Congress.

[7] "Bureaucracy Is Greatest Threat to Press Freedom," *Editor & Publisher*, Vol. 72, No. 39 (September 28, 1940), p. xiv.

wholly upon a point of view. But the fight to amend the NRA code pattern, on the assumption that business restrictions did abridge the First Amendment, constituted a significant victory for the publishers and an important precedent which may have value for the future.

UNIONIZATION OF NEWSPAPER EMPLOYEES

The next phase of government restriction on the newspaper business, if not on the freedom of the press, was the encouragement given unionization of employees, especially those in the news departments. It has already been noted that a newswriters' union under Heywood Broun began to form the same week that the publishers announced their conditional acceptance of the NRA. The NRA code indicated that certain conditions were favorable to the growth of unions, for it set up minimum wages, ranging from eleven to fifteen dollars per week, which applied to reporters as well as to the printing trades. Reporters earning thirty-five dollars or more a week were to be classed as professional workers and made exempt from overtime provisions of the code.[8]

A guild spokesman said on April 20, 1934, that

> as nearly as we can find out, the average wage for a reporter in New York City is $42 a week. Freight handlers in 1932 were getting $18.23, and there are pretty good kids working on New York newspapers with a college education, reporting news, and doing pretty well at it, not getting more than $18 a week.[9]

Allen Raymond, president of the New York Guild in its formative stages, told the American Society of Newspaper Editors about his organization and its purposes in 1934. He described journalism as a calling which men identify as a profession because of their pride in it and the traditions of individual initiative and achievement. But it was a woefully underpaid profession, he said, with journalists in New York putting in six- and seven-day weeks at work of such rigor that at fifty or sixty they were "used up, burned out by the current of news that has been going through them."[10]

Raymond said that the low pay of the writers and editors was due partly to the operation of newspapers for what profit they could earn, on one hand, and to the successful demands of the typographical unions, backed by collective bargaining, on the other hand. This was the situation the guild intended to tackle, but Raymond did not

[8]National Labor Relations Board, Division of Economic Research, *Collective Bargaining in the Newspaper Industry* (Washington, D.C.: U.S. Government Printing Office, 1939), p. 114.
[9]*Proceedings of the American Society of Newspaper Editors*, 1934, pp. 86–87.
[10]*Ibid.*, pp. 85–87.

want or expect the movement to take the form of a labor union. Instead, he viewed it as a kind of organized partnership in which working conditions were to be improved by understanding between employer and employee, with stronger methods used only on the few recalcitrants. But he realized that things were in a formative state:

> We don't know what our policy is. We know what our purpose is. It is two-sided. One side is to give greater security and a more decent standard of living to ourselves, selfishly, to use a little bit more commercial brains than we have ever done or had, to develop them. That is one side of it, and the other side is to let the voice of the working newspaperman speak out with more freedom than has ever been used heretofore, to the end that the thing that we are doing, the institution we are serving, will be a greater and freer institution.[11]

Raymond recognized that intellect and intelligence could not be unionized, and promised to avoid the apprentice system in training new men for journalism, using instead some educational plan like that of medicine and law.

Among Raymond's hearers when he talked to the newspaper editors was Roy W. Howard, who had come up from reporter to chain publisher. Sympathizing with the desire of news employees for more pay, and feeling them entitled to it, Howard was nevertheless uneasy, he said, because he found the steel ribs of trade unionism in the new garment that the guild was fashioning. He feared that an editorial union would have to go into politics associated with class interests in order to achieve its objectives, and this would mean a new era of partisan journalism for the newspapers.

> Because, if our papers are to be made up entirely of reporters and copy men and rewrite men and editors who are partisan adherents to the trade union idea, we have our papers immediately, if Mr. Raymond attains his hundred per cent objective, return to class publications.[12]

On the same occasion, Colonel Ernest G. Smith of the Wilkes-Barre *Times-Leader* observed that unions do not always represent the rank and file of employees. They are directed, he said, by

> the younger element who have no responsibilities, and so they inflict their views and often their hardships upon the publisher. . . . But if we are approached on the ground of humanity, on the ground of fairness rather than with threats . . . I think perhaps we can get somewhere with it.[13]

A fair interpretation of Colonel Smith's viewpoint, which a large

[11] *Ibid.*, p. 88.
[12] *Ibid.*, pp. 96–97.
[13] *Ibid.*, p. 99.

section of the publishing interests shared, is that everything would be all right so long as the news department employee came into the publisher's office with hat in hand. There was a drastic counterweight to that very point of view in the not-distant offing, the Wagner Act, which was to give the employee the economic right not only to come in with his hat on but also to put his feet on the table alongside those of the boss if he cared to do so.

The more serious issue had been stated by Howard. It was repeated by Marlen E. Pew, then editor of *Editor & Publisher* and a supporter of the guild idea with reservations as to trade unionism. He said:

> Place yourself in the position of the publisher or editor if you want to get a true slant on this question. How would you feel if your reporters were to align themselves with a movement that depends on propaganda and political action for success? How much confidence would you place in their copy dealing with these great controversies? . . . Well, how would you feel? . . . How could you expect, of your unionized and therefore straight-jacketed reporter, that degree of eye-to-eye loyalty that is the basis, as every man in this room knows, of good newspaper work, the kind that serves up to the citizen reader the facts he must have to guide his private life and political action? If, as an editor, you would resist unionization for the reasons I have stated, how can you as a reporter in conscience ask for it?[14]

Newsmen and the Wagner Act

The issues had been irretrievably drawn even as the newspaper editors and guildsmen thus talked of their common problems. Good will had had its chance, and the oratory of 1934 was both a funeral oration for a lost or unrealized ideal and an invocation to new life. The guild, meeting in June 1934, found its eight thousand members loosely held, its powers decentralized to the point of impotence, and a stronger bargaining position necessary. It had signed only one important bargaining agreement, and its efforts to negotiate others had caused the ANPA to alert its members and to advise them not to enter contracts with the guild.

The 1934 guild convention rejected the professional-club idea and moved uncertainly into trade unionism. The decision had been made, and a strike against the Long Island *Daily Press* on issues of recognition and reinstatement of workers who, the guild said, had been fired for union activity was merely the rash which inevitably followed the long fever of indecision. From then on the guild was

[14] *Ibid.*, pp. 105–6.

to encounter a vigorous and organized opposition, which "employed the traditional antiunion weapons, used at an earlier date in the printing section of the industry: refusal to recognize, discriminatory discharge, and professional strikebreaking."[15]

The Wagner Act became effective on July 5, 1935, and it soon became necessary to test the contentions of the publishers as to freedom of the press against the rights guaranteed to news department employees under the act. On the same day that the United States Supreme Court decided *NLRB* v. *Jones & Laughlin Steel Corporation* it also applied the act in its full force to the newspaper business.[16]

The Guild Shop Issue

In the interval between enactment of the Wagner Act and its enforcement by the Supreme Court, the freedom of press issue was intensified by the union desire to bargain for a guild shop. This was an intermediate plan between the open shop and the closed shop, giving the publisher complete freedom to hire, but requiring guild membership after a period of thirty days.

The board of directors of the ANPA advised its members against the guild shop contract:

> The position of the publishers is that the guild shop is in effect a closed shop, and that the inclusion of all editorial employees in the Guild would lead to biased news writing and consequently to violation of freedom of the press.[17]

The ANPA committee asserted, in its letter to members, that the responsibility for operating the newspapers rested on the publishers and managers, and that they should avoid any agreement restrictive of that responsibility. It declared, further:

> While it is impossible for the government to destroy, or even restrict, the freedom of the press, it is not impossible for an individual publisher by agreement or otherwise to do so insofar as his own newspaper is concerned and he may do so either by a course of conduct or by contractual agreement. . . .
>
> Any agreement restricting the publisher's control of his editorial and news departments necessarily restricts him in the performance of this function [the gathering and dissemination of information] and his obligation to the public, and it is the board's opinion that no such agreement should be entered into.[18]

[15]National Labor Relations Board, *Collective Bargaining in the Newspaper Industry*, p. 170.
[16]*NLRB* v. *Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937); *Associated Press* v. *NLRB*, 301 U.S. 103 (1937).
[17]National Labor Relations Board, *Collective Bargaining in the Newspaper Industry*, p. 130.
[18]*Ibid.*, p. 130, quoting *Editor & Publisher*, December 12, 1936, p. 12.

The American Newspaper Guild stated its reasons for desiring the guild shop as follows:

First, it is the Guild, not the publishers or unorganized editorial workers, which is improving wages and working conditions in the industry. The financial burden of this program is large and the revenues from dues and assessments are woefully inadequate to meet the needs for the organizational and collective bargaining assistance. Many guildsmen complain of the burden of assessments and yet cannot see the importance of spreading, through the guild shop, the cost of Guild gains and improvements to all who are benefitted.

Secondly, the publishers can gradually eliminate Guild members in the guise of economy with the possible result that by the time the Guild agreement terminates the Guild is too weak to conclude another contract. Without the guild shop we can be fired or arbitrated out of existence.[19]

The constitution of the American Newspaper Guild, in Article II, Section 7, protects members in case of internal action against anything they write and gives them full freedom of speech. Local guild constitutions and bylaws afford additional protection.[20] There is no record of evidence that any guild unit has sought to deprive a publisher of his prerogatives.

The Associated Press and the Wagner Act

When the AP case went to the Supreme Court, freedom of the press was one of the issues, but it was presented obliquely and disposed of without really determining whether unionism, per se, when it operates to bias the news, actually infringes freedom of the press. Here the AP had clearly violated the Wagner Act, and the case was decided on that point alone.

Morris Watson, an employee of the AP in New York City, was fired in 1935, and the guild called his discharge a violation of the Wagner Act.[21]

A complaint was issued and a hearing held before a trial examiner. A motion by the AP to dismiss was overruled on all grounds after an investigation of the applicability of the commerce power. After the AP had ignored the board hearing, a cease-and-desist order was

[19] *Ibid.*, p. 131, quoting *Guild Reporter,* June 20, 1937.

[20] *Transcript,* proceedings before tri-partite panel, National War Labor Board, Daily Newspaper Printing and Publishing Panel, Case No. 111-1586-D, July 7, 1943. Reported by Joe J. Isen, p. 16.

[21] 49 *Statutes* 449 (*U.S. Code Annotated,* Title 29, Sec. 151). Pertinent provisions include:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

Sec. 8. It shall be an unfair labor practice for an employer—

issued, warning the AP not to discourage membership in the guild, not to discriminate against employees who joined the guild, and not to coerce its employees in exercise of the rights guaranteed by Section 7 of the act. The AP was ordered further to reinstate Watson and give him back pay, and to post a notice for thirty days that it was discontinuing the objectionable policies.[22]

Upon the refusal of the AP, the board applied to the circuit court of appeals for an enforcement order, which came after the constitutional point had been argued.

The AP did not challenge the board's finding of fact, and Justice Roberts duly noted the fact when the case came to the Supreme Court for review. Said he:

> We, therefore, accept as established, that the Associated Press did not, as claimed in its answer before the board, discharge Watson because of unsatisfactory service, but, on the contrary, as found by the board, discharged him for his activities in connection with the newspaper guild.[23]

Under the definition of "interstate commerce" in the act, the court said, the AP was clearly subject to the law. Its operations were described as "interstate communication" of a business nature, and the Wagner Act, which was designed to reduce interruptions in the flow of commerce attributable to labor disputes, had operated successfully in that field.

The court pointed out that in the railway labor cases it had already held similar legislation valid as affecting clerks and other employees who had no direct contact with the actual equipment which crossed state lines.[24] It added:

> These decisions foreclose the petitioner's contention that Watson's employment had no relation to interstate commerce and could not be subjected to the regulatory provisions of the National Labor Relations Act.[25]

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

[22] 301 U.S. 103, 123–24 (1937).

[23] *Ibid.*, 124–25.

[24] *Texas & New Orleans R.R.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 (1930); *Virginian Ry.* v. *System Federation No. 40*, 300 U.S. 515 (1937); *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184 (1921).

[25] *Associated Press* v. *NLRB*, 301 U.S. 103, 130 (1937).

In arguing the point of freedom of the press, the AP said that in effect it was the press itself, and that its news report must be kept "free from partisan activity or the expression of opinions." To do so, it must have absolute freedom to hire and fire its news writers, and if it could not determine for itself the "partiality or bias of editorial employees," it would be unable to furnish a free and uncolored news report. Any law protecting union activities, even collective bargaining, "on the part of such employees, is necessarily an invalid invasion of freedom of the press," said the AP. The court rejoined:

> We think the contention not only has no relevance to the circumstances of the instant case but is an unsound generalization. The ostensible reason for Watson's discharge, as embodied in the records of the petitioner, is "solely on the grounds of his work not being on a basis for which he has shown capability." The petitioner did not assert and does not now claim that he had shown bias in the past. It does not claim that by reason of his connection with the union he will be likely, as the petitioner honestly believes, to show bias in the future. The actual reason for his discharge, as shown by the unattacked finding of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. These considerations answer the suggestion that if the petitioner believed its policy of impartiality was likely to be subverted by Watson's continued service, Congress was without power to interdict his discharge. No such question is here for decision.[26]

The court interpreted the claim of bias, which could well have been taken from Roy Howard's remarks to the American Society of Newspaper Editors, as completely nonexistent in this case. What it would have done if the facts had been different, it is useless to conjecture. But it pointed out that the Wagner Act does not force a publisher to employ anyone whom he does not trust, and that it does not prevent an employee's discharge if incompetency is shown, or the discharge of

> . . . one who fails faithfully to edit the news to reflect the facts without bias or prejudice. The act permits á discharge for any reason other than union activity or agitation for collective bargaining with employers. The restoration of Watson to his former position in no sense guarantees his continuance in petitioner's employ.[27]

The court then called the roll of limitations upon freedom of the press which have been upheld:

[26] *Ibid.*, 131 32.
[27] *Ibid.*, 103, 132.

The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others, he must pay equitable and nondiscriminatory taxes on his business. . . . The order of the board in nowise circumscribes the full freedom and liberty of the petitioner to publish the news as it desires it published or to enforce policies of its own choosing with respect to the editing and rewriting of news for publication, and the petitioner is free at any time to discharge Watson or any editorial employee who fails to comply with the policies it may adopt.[28]

The remarkable group of four justices which had dissented in *Near* v. *Minnesota,*[29] when the court prevented a continuing censorship under court injunction designed to control newspapers adjudged undesirable, opposed the *AP* decision. Justice Sutherland wrote the minority opinion, joined by Justices Van Devanter, McReynolds, and Butler. The dissenting opinion was largely a hortatory one, but it drove a clean line through the argument upholding the Wagner Act by taking the position that freedom of the press is an indivisible, mandatory principle of American government.

From this point of view, when the Constitution stipulated that "Congress shall make no law . . . abridging freedom of speech, or of the press" it was to be taken at its face value. The minority was unwilling to take any chance on abridging freedom of press because of its great importance in a democratic society, and the "least approach toward that end should be halted at the threshold."[30]

Justice Sutherland was unwilling to define freedom narrowly in this respect. To him it obviously meant "more than publication and circulation," because, if the publishers could not adopt and follow a policy of their own, how foolish it was to call this restriction "freedom." He did not see how a guild organizer could be expected to handle labor news without prejudice, and he looked upon the AP decision to fire Watson as one justified by the facts and certainly beyond the power of Congress to enjoin.[31] And he saw an opportunity for the guild to develop a "high degree of control" over the character of the news service, as a result of the majority opinion. The publishers, he felt, were right when they said that control of their men was lost when allegiance was transferred to a union. He concluded in moving words:

[28] *Ibid.*, 132–33.
[29] 283 U.S. 697 (1931).
[30] 301 U.S. 103, 136 (1937).
[31] *Ibid.*, 138–39.

Do the people of this land—in the providence of God, favored, as they sometimes boast, above all others in the plenitude of their liberties—desire to preserve those so carefully protected by the First Amendment: liberty of religious worship, freedom of speech and of the press, and the right as freemen peaceably to assemble and petition their government for a redress of grievances? If so, let them withstand all *beginnings* of encroachment. For the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time.[32]

The net result of the AP challenge of the Wagner Act was that the publishers had built up one case in their own minds and in the eyes of the public, but had gone to trial on another case—the issue of firing a man for union activity. The defeat on the one issue tended to blind them to the fact that the other issue had never come to trial.

Scope of Power Used by NLRB

Three other NLRB cases will serve to show the scope of this law's effect on the press. *Press Co., Inc.* v. *NLRB* raised the same issues as the *AP* case. Since it concerned a Gannett newspaper which had the advice and support of a central holding company, and since it arose as a result of dismissals during a merger of newspapers in Albany, New York, by which Hearst and Gannett divided the field, some unusual elements of the case were more interesting than its contribution to law.

In consolidating two newspaper staffs into one, the executives were faced with the job of reducing the number of employees from 514 to 356. In the news department the selection was left to B. J. Lewis, editorial director, and he was accused of having seized this opportunity of a lifetime to eliminate the most influential guild members in his plant.[33]

The evidence showed that through some clairvoyance Austin J. Scannell, a guild leader, had been transferred to the morning paper by Lewis just a month before the merger was announced. He was thus in position for easy discharge, and he was so handled when the morning paper was abandoned. The board ordered his reinstatement along with two others.

Lewis, the editorial director, did not testify as to the basis upon which he selected men for discharge. The court interpreted his silence broadly and gave the guild the benefit of the doubt. Moreover, Lewis was shown to have obtained complete reports of guild meet-

[32] *Ibid.*, 141.

[33] *Press Co., Inc.* v. *NLRB*, 118 F. 2d 937, 939 (1940); cert. den. 313 U.S. 595 (1941).

ings, promptly after they took place, through some system of espionage. The board used the evidence of labor spying to back its finding of interference with union activity.[34]

The freedom of the press issue in the Gannett case was the contention of the publisher that the First Amendment entitled him to withhold the "basis of his selection of employees," and prohibited any "unfavorable inference from silence on the subject." Said the court:

> It is not easy to see how a free press is either protected or promoted by the publisher's refusal to testify in denial of union discrimination and in frank explanation of the grounds for selection and dismissal of editorial workers any more than in the case of other workers. Here, we think, the refusal, coupled with the inferences properly deducible therefrom, justified the board's action.[35]

The board had cited both the operating company and the holding company, but the court removed the holding company from the order. Judge Rutledge dissented on this point:

> In so complicated a structure of legal authority and operating power as was presented here, one attempting to deal with a particular unit, such as Press Co., may be confronted with a perpetual game of hide-and-seek in the maze of interlocking officials and capacities to find the actual persons who have power to act.[36]

NLRB v. (San Antonio) *Express Publishing Co.*,[37] although a newspaper case, is important mainly because of its effect on administrative law. The issue was the scope of the board order to cease and desist, and the majority held that the order was too broad. It was enforced only in case of violations of Section 7 (a) shown in the record.[38]

Also, the general language of the order was required to give way to "reasonable specificity" in detailing what the newspaper might and might not do. It must appear, said the court, that the violations stipulated in the order bear "some resemblance to that which the employer has committed, or that danger of their commission in the future is to be anticipated from the course of his conduct in the past."[39]

Justices Douglas, Black, and Reed dissented, saying that the ad-

[34] *Ibid.*, 939–43.
[35] *Ibid.*, 942. Compare *St. Louis Southwestern R.R. of Texas* v. *Griffin*, 154 S.W. 583, 585 (1913), and, as cited by the court, *Montgomery Ward & Co.* v. *NLRB*, 107 F. 2d 555, 559 (1939).
[36] 118 F. 2d 952.
[37] 312 U.S. 426 (1941).
[38] *Ibid.*, 436–37.
[39] *Ibid.*, 437.

ministrative board knew whether its order was apropos or not and could be relied upon to issue the order most likely to carry out the act.

The case has historic importance because, in line with other key decisions of the court since the administrative board problems appeared, it limited the board to fairly narrow powers rather than to sweeping general ones.

NLRB v. *Hearst Publications, Inc.* established the adult news vendors who worked in fixed locations as employees under the Wagner Act and approved a bargaining agency for them.[40] The court justified this interpretation, which was not in accordance with the common law, not only by referring to the broad definition of "employee" in the act but also by stating that no simple test exists under the common law to distinguish an employee from an independent contractor.[41]

Justice Rutledge argued that if the common law were applied, it would mean that Congress had in mind a different application of the law in each state.

Under Colonel McCormick's definition of freedom of press, this decision definitely violated the First Amendment because it substantially increased the cost of doing business. The Supreme Court, which had narrowly confined the board in the *Express Publishing Co.* case, was less cautious here, even surrendering its right to determine whether the board had jurisdiction to consider the case and to hand down its order. Taking shelter under the concept of broad economic relationships, without inquiring specifically into the details of those relationships, the court found against the newspaper. In so doing, it made employees[42] out of a group traditionally treated as independent contractors in the newspaper business.

Alteration of Property Rights

It would seem a fair conclusion that the application of the Wagner Act, in the cases reviewed, has made important alterations in the property rights of newspaper ownership and management, and that the full effect of the changed conditions on the purposes of the First Amendment is not yet visible.[43] For, under the interpretation of the

[40] 322 U.S. 111 (1944).

[41] *Ibid.*, 120. [42] *Ibid.*, 123.

[43] Other cases affecting the newspaper business include *NLRB* v. *A. S. Abell Co.* (Baltimore *Sun*), 97 F. 2d 951 (1938); *NLRB* v. *Hearst*, 102 F. 2d 658 (1939); *NLRB* v. *Clarksburg Publishing Co.*, 120 F. 2d 975 (1941); *NLRB* v. *Knoxville Publishing Co.*, 124 F. 2d 875 (1942); *NLRB* v. *Times-Picayune Co.*, 130 F. 2d 257 (1942). In every case the decisions were made under general interpretations unmodified by considerations of the First Amendment.

courts, the process of social and economic change sweeps the press along with it, unhindered by the stern injunction of the First Amendment, so long as prior censorship of a direct nature or punitive legislation is avoided.

In the short run, this may tend to weaken the control of the press —as of any business—by those presently in charge of it and to hasten its adjustment to the policies fixed by majority government. In the long run, the device can be used by every majority government, and compulsions will be present to that end. The press will feel greatly increased internal as well as external pressure to join the political pack hunting at the moment, and its division of loyalty between politics and business will impair its traditions of independence.

The facts seem to be that both action groups and standpatters look upon the press as an invaluable prize in the ceaseless struggle to obtain and hold majority control. When the two poles of existence, the political and the economic, happen to be held, as in the 1931–47 period, by opposing political forces, both the freedom and the security of the press are put in double jeopardy. The danger is that the opposing factions will be so anxious to control what the press says and how it says it that both political and economic independence, as originally established by the Revolution and the First Amendment, will be lost.

THE CONTROVERSY OVER THE GUILD SHOP

A month after the Supreme Court decision in the *Jones & Laughlin* and *AP* cases, representatives of the ANPA and of leading regional and state press associations met in Chicago and formed a committee to handle the problems arising from increased union pressure. The ANPA had already taken a strong stand against guild shops and any contractual agreement with editorial unions, but it seems to have withheld the full weight of its attack on the guild until after the AP decision.

The organized opposition apparently checked the growth of the guild shop without having a corresponding effect on the American Newspaper Guild.[44] The full scope of the guild shop issue is contained in the prolonged discord over maintenance of union membership orders of the War Labor Board, and discussing them largely in

[44]The number of guild contracts in effect on June 10, 1947 was 220. Of these, 119 contained a "full or modified Guild shop" provision, 45 provided for maintenance of membership, and 53 called for either preferential hiring or notice to the guild of staff vacancies. Anonymous, *Wages and Conditions American Newspaper Guild Contracts, June 10, 1947* (New York: Research Department, American Newspaper Guild, 1947), p. 13.

that connection will not result in an undue simplification of the issues.

The tendency is to place the dividing line between a legitimate and an illegitimate trade organization at a point where the benefits of organization are restricted to members. The members of the usual organization, whether it be the National Association of Manufacturers or the CIO, work toward objectives which, when realized, tend to benefit all related economic or political interests. The ANPA, for example, does not receive support from all daily newspapers in the country, but it tends to represent them because of a community of interest. The papers who support the ANPA carry the "free riders" who do not pay.

That is the union problem, too. When organization has to be substituted for individual bargaining, the benefits which result must be shared by all employees of the same class, or else the union will stand suspected of being a racket.

The reasons for lack of unanimity seem to belong more to the subjective realm of human nature than to concrete, objective factors. Whatever the organization, unanimity appears to come through coercion.

The closed shop is a form of contract, sanctioned by federal statutes before June 1947, which confined employment to members of the contracting union. The variations beyond this general definition were infinite, and the device was useful to those who abused the labor movement as well as to those who served it honestly. Giving the union control of the whole plant labor force eliminated free riders and lessened the tendency, natural to organizations, to disintegrate unless constantly renewed by membership campaigns. The union shop proponents say that it helps to keep labor peace, too, by permitting the leadership to plan a long-range program rather than the less desirable and more drastic short-term drive for objectives which frequently produces a strike. Its opponents describe it as "un-American," some states have banned it by constitutional amendment,[45] and its protection under federal law ceased with revision of the Wagner Act in June 1947.

When it was found that World War II required wholesale shifts of labor, stringent manpower regulations, wage-freezing, and no-strike pledges, some unions faced conditions more conducive to disintegration than to survival. Accordingly, it seemed incumbent upon the labor agencies of the government to work out a plan which

[45]See *AFL* v. *Watson*, 327 U.S. 582 (1946).

would stabilize union membership and assure maximum production uninterrupted by strikes.

Having in mind that the problem was acute in open shops, the WLB devised its maintenance of membership formula. In essence, this formula set up a limited period during which members could leave the union and after which, during the life of the labor contract —usually one year—the worker had to remain in good standing or be liable to discharge.

An impartial arbiter was appointed to hear disputes over any coercion or intimidation in connection with the escape period of fifteen days or the operation of the discharge clause. Each succeeding contract to which the maintenance of membership provision applied was to have a similar escape period.

The National Wartime Policy

When it came to applying the wartime formula to the newspaper business, there was heavy opposition, buttressed by argument on freedom of the press. The Newspaper Commission, which handled newspaper problems in the first instance for the WLB, had settled several deadlocks between union and management by awarding maintenance contracts, despite strong protests, and the publishers were anxious for a showdown. Accordingly, the case of the Harrisburg *Patriot,* involving the maintenance issue, was certified to the WLB and decided on March 3, 1944.[46]

After explaining its maintenance of membership plan and asserting that it did not abridge the publishers' right to hire and fire as already determined under the Wagner Act, the board said that no publisher had a right, in law, to retain any employee, and that therefore an employee could voluntarily contract to leave his employment under stated conditions such as those incorporated in the maintenance of membership agreement.

The publishers argued, in reply to this view, that any rule imposed by a government board violated freedom of the press, for the First Amendment deprived Congress of the power to authorize any board to control publishers in the business of gathering and disseminating information.

This was the old issue of *Associated Press* v. *NLRB,* now a veteran of courts and of administrative decisions but no less controversial. The board here utilized the same distinction which the Supreme

[46]American Newspaper Publishers Association, Special Standing Committee, *Bulletin,* No. 4632, March 10, 1944.

Court had made between freedom of the press and discrimination against workers because of union affiliation, and held that its maintenance of membership provision did not violate the First Amendment. Said the WLB:

> Such an order, which affects only the employer's opportunity to retain the services of an employee who has voluntarily chosen to make his employment subject to continued union membership, would be definitely less restrictive of the employer's freedom to conduct the business of gathering and disseminating information than was the order which directly restricted the employer's right to discharge.[47]

The board then approached the question of public policy raised by the employers in the case, considering it necessary to justify not only its power but also the correctness of its application here. The publishers had stated their fear of unfavorable public reaction and distrust when it became known that their writers were solidly aligned with a militant labor union whose ventures into partisan politics were well known. The board felt that guild shop conditions were established in enough papers of various shades of political opinion to allay any fears which might arise on this point.

The Threat of Bias

The publishers likewise stated their fear that the maintenance of membership power would enable the guild to increase its influence over the "opinions and professional writings" of the news staff, but the board regarded this as the field of basic individual rights with which neither the publishers nor the guild might interfere. Although the employee was as much entitled to prejudices as the publisher, when they crept into his professional work and could be identified the publisher had Supreme Court authorization to discipline the offender.

The board pointed to Section 7, Article II, of the guild constitution, which prevented barring any eligible person from membership or penalizing any person "by reason of sex, race, or religious or political convictions, or because of anything he writes for publication," and stipulated that this guarantee was to become a part of maintenance of membership contracts and was to be administered by the impartial arbiter.[48]

The net effect of this provision was to incorporate in the contracts, as a substantive matter, a guarantee of a fair hearing on any charge

[47] *Ibid.*, p. 187.
[48] *Ibid.*, p. 189.

that freedom of the press was being violated by operations of the contract. Said the board:

> This is an appropriate implementation of the provision of the Guild constitution just as the maintenance clause is an appropriate implementation of the employee's voluntary agreement to remain a member of the union.[49]

Except for this safeguard, the board said that it saw no reason for special treatment of the newspaper business. It asserted that its maintenance of membership provision was clearly in harmony with Section 8 (3) of the Wagner Act and that its application could be undertaken with confidence that Congress had approved inclusion of the press in advance. It said that the freedom to bargain collectively was not inharmonious with the freedom of the press, and that:

> In fact, actual experience in the newspaper industry itself has already demonstrated that the full exercise of one need not and does not in any way preclude the full exercise of the other.[50]

The reasoning behind the national policy decision can be learned in part from a Newspaper Commission hearing—typical of several on the same issue—on behalf of a guild local which had asked a directive for a guild shop. Said John J. Biddison, speaking for the Twin Cities Local No. 2 of the guild:

> The Guild has no idea of invading the field of editorial control, policy making, anything of that sort. . . . The Guild doesn't want to have anything to do with the policies of the newspapers. A great many of its members probably do not agree with some of these policies. And so, we were very much surprised that management would bring out this bogey of "freedom of the press" as a reason for refusing to give Guild shop to the employees who asked for it.[51]

Biddison said that the only thing guild members could agree upon was a collective bargaining policy, and when it came to "political policy, economic policy, social theories, and so forth" the members couldn't influence a newspaper because they couldn't agree among themselves. He asserted that his guild unit already had most of the news employees, anyway, and that adding the few more could not increase the hazards of coloring the news.

Chairman F. W. Deibler questioned Biddison, an experienced newspaperman, on the detection of bias in the news:

[49] *Ibid.*

[50] *Ibid.*, p. 190.

[51] *Transcript*, proceedings before tri-partite panel, National War Labor Board, Daily Newspaper Printing and Publishing Panel, Case No. 111-1586-D, July 7, 1943. Reported by Joe J. Isen, p. 18.

CHAIRMAN DEIBLER: Would it be feasible from your observation, for a publisher to detect whether a Guildsman was actually coloring the news or not?

MR. BIDDISON: Oh, I am sure it would. It is possible that some one story one day might be colored without the employer discovering it for perhaps a day or two, but a repetition of that sort of thing would be very quickly found out.

CHAIRMAN DEIBLER: Suppose that such an instance were brought to the attention of management. What would be the position of the Guild in handling a refusal to abide by paper policy?

MR. BIDDISON: The Guild would say that he was subject to discipline of the publisher. We have put it in writing here in our brief, that any man who refuses to be guided in his work by the policy of the paper is properly subject to discharge, and if the publisher doesn't discharge him, he has overlooked a bet.[52]

At the same hearing, G. A. Youngquist, the attorney representing the Minneapolis daily newspapers, stated his case as follows:

. . . No employer should be placed in the position where, by reason of membership of his employees in an organization that holds views contrary to his own, he shall always be on watch to detect that sort of thing [bias in the news]. The loyalty should be undivided, and in view of the political action taken, and declarations made by the Guild, one cannot say that the loyalty is, or can be, undivided.[53]

The Selection of a Bargaining Agency

One other matter of guild operations under the law caused concern among publishers, and that was the company in which the news department men sometimes found themselves placed in elections to pick a bargaining agency.

For example, rival AFL and American Newspaper Guild (CIO) unions sought to organize the news staff of the New York *Times*. The guild petitioned the NLRB for a bargaining unit of 551 employees, including typists, secretaries, clerks, and office boys in the news department, as well as the writers and editors. The AFL union's proposed unit included 342 of those in the guild proposal, a majority of the writers and editors. The AFL unit asked the NLRB to consider its members as professional persons entitled to representation apart from the clerical employees. It excluded librarians, supervisors and indexers in the *Index* department, artists, map artists, photographers and a photostater, layout artists, and a photographic

[52] *Ibid.*, pp. 29–30.

[53] *Ibid.*, p. 97. The views of Arthur Hays Sulzberger, publisher of the New York *Times*, amplify the position of publishers on this point. See 26 NLRB 1094, 1099 (1940).

printer in the rotogravure department, statisticians in the financial news bureau of the news department, and clerks, while the guild included all these persons.

One board member, William M. Leiserson, alone supported the AFL on this point, and the unit ordered by the board included 587 persons selected by the board's formula of functional interdependence. The guild received 295 votes and the AFL union 202 out of 547 ballots cast in the resulting election. The board designated the guild as bargaining agent.[54]

Advertising salesmen of the News Syndicate Company of New York were included in a bargaining unit with other employees of the commercial departments. At the New York *Daily Mirror* the company refused recognition to the guild except as a representative of the news department employees, but the board bridged the gap again by using the functional interdependence concept and the newsmen, like those of the *Times,* were included in a larger unit with clerical employees.

At Boston the representation issue was complicated by the claims of a guild unit, an AFL newswriters' union, and the Stenographers' Union local. The guild sought a contract covering "all employees of the company, excluding executives, press clerks, paper handlers, bootjacks, building service and maintenance employees, and also excluding those employees for whom nine enumerated craft unions had already bargained and secured contracts."[55] The guild, on this occasion, lost the editorial department workers to the AFL union but won the election as representative of the general plant unit.

These developments show that the guild has promised to disown a writer convicted of biased handling of news matter, and at the same time it pledges, in its constitution, not to deny membership or to penalize any person on the basis of what he has written for publication. Newswriters often found themselves in a bargaining agency they did not prefer because of the guild policy of reaching out for office employees. The publishers still assert sincerely that they feel no confidence in a man who must give his first loyalty to a union,

[54]*In Matter of New York Times Co. and American Newspaper Writers Association (AFL) and New York Times Co. and Newspaper Guild of New York,* 32 NLRB 928, 933–35 (1941), and 35 NLRB 17 (1941). The 1947 revision of the national labor law stipulated [Section 9 (b)] that the NLRB may not designate as bargaining agent a unit containing both professional employees and employees who are not professional employees unless "a majority of such professional employees vote for inclusion in such unit." The courts will need to reverse themselves and classify guild newsmen as "professional employees" before this provision clearly applies to newspaper bargaining units. See *Walling* v. *Sun Publishing Co.,* 140 F. 2d 445 (1944), and the discussion of the word "professional" in this chapter.

[55]National Labor Relations Board, *Collective Bargaining in the Newspaper Industry,* pp. 165–66.

and charge that their freedom is infringed to that extent. The narrowness of the interpretation given the First Amendment has led the courts away from, rather than into, the merits of this issue, partly because there has been no dismissal case on a charge of biased news writing yet adjudicated. The health and well-being of all departments of the newspaper are as important to society, and to the freedom of the press, as absence of censorship, and the effect of every government regulation should be regarded by the legislators and the courts as a substantive matter, entitled under the Constitution to closest scrutiny.

THE FAIR LABOR STANDARDS ACT

The essential question presented by litigation over the Fair Labor Standards Act of 1938, popularly known as the wage and hour law, was whether the First Amendment prevented Congress from applying general laws of this nature to newspapers because the operating ability of the newspapers was affected thereby.

The Supreme Court of the United States has held that Congress had the power of applying general legislation to the press, and that the First Amendment no more inhibited the application of such a law to newspapers than it did the application of libel or tax laws, both of which operated so as to cost the newspapers money.

A study of the operations of seventy newspapers with circulations ranging from 5000 to 40,000, which was made by a division of M. S. Kuhns and Company for newspapers and newspaper trade associations, is summarized in the accompanying table. An important point is that the net profit of these newspapers, before income taxes, ranged from a group average of 4.97 per cent in the circulation group of 5000 to 6000, to 13.17 per cent—the highest point—in the circulation group of 20,000 to 25,000. The amounts of money at opposite ends of this range are $4966.76 and $65,575.06. In either the lowest or the highest group the profits are not high in proportion to investment and gross business, and in either case the margins are small enough so that the wage and hour law became a factor affecting the successful operations of the property.

The figures in the table are not adequately selected to represent the newspaper business as a whole, but merely show the type of business here being discussed. In fairness to the businessmen of this class who are subjected to social legislation, the somewhat blind operations of which tend to become more onerous as the size of the business decreases, it should be stated that no one who has not experienced their responsibilities can really appreciate their problem.

SUMMARY OF THE 1940 OPERATIONS OF SEVENTY NEWSPAPERS, GIVING AVERAGES BY CIRCULATION GROUPS

Circulation	No. of Papers in Group	Total Revenue	Total Expense	Profit before Taxes in Dollars	Profit before Taxes in Percentage of Revenue
5000 to 6000	9	$ 99,916.76	$ 94,950.00	$ 4,966.76	4.97
6000 to 7500	8	$120,903.29	$112,024.91	$ 8,878.38	7.34
8000 to 10,000	8	$156,955.35	$140,863.45	$16,091.90	10.25
10,000 to 12,500	7	$232,608.92	$205,489.09	$27,119.83	11.66
12,500 to 15,000	5	$316,087.92	$287,482.94	$28,604.98	9.05
15,000 to 20,000	9	$382,316.40	$339,180.58	$43,135.82	11.28
20,000 to 25,000	7	$498,097.07	$432,522.01	$65,575.06	13.17
25,000 to 40,000 evening and Sunday	7	$619,696.97	$568,824.59	$50,872.38	8.21
15,000 to 22,500 morning, evening, and Sunday	6	$330,688.83	$295,106.69	$35,582.14	10.76
22,500 to 30,000 morning, evening, and Sunday	4	$461,147.71	$415,410.48	$45,737.23	9.92

Laws passed in the name of the greatest good for the greatest number of citizens sooner or later must be executed not by the courts or by the legislatures, but by the management of the business in which the individual citizen is employed. If that business cannot carry the added burden, it must fail, and other employment must be found for the displaced persons. The question that the papers and the ANPA asked the courts was whether the First Amendment stayed the operations of a general law which jeopardized the ability of a newspaper to operate. The courts said no.

Congress amended the original wage and hour law before passage to exempt weekly newspapers with a circulation of 3000 or less, and this specific exemption has been regarded as evidence of intention to apply the act to other newspapers. The law is a complicated one, the true meaning and application of which, at the time of its enactment, was hardly apparent to either layman or lawyer.

In the hands of an expert administrator, the broad provisions of the law were augmented and implemented by detailed regulations. The bill, which according to Congress effectuated a national policy of putting a floor under wages and a ceiling over hours, in practice raised the wages of workers all along the line if they had been regularly employed in excess of the maximum hours provided in the act and at a flat weekly or monthly wage. From the public complaints heard at the time, the law apparently struck the small newspapers most unexpectedly in its application to the news department workers.

News Workers as Professional Persons

The ANPA argued that the First Amendment forbade applying the law to newspapers and simultaneously, through its members and agents, sought to exempt news department employees from the act by classifying them as professional workers. The aid of journalism schools was solicited in the effort to persuade the federal administrator and the courts that newswriters making less than two hundred dollars a month were professionals and should be exempt from the overtime provisions. The courts, in one instance, mention that affidavits of experts supporting this point have been noted.[56]

The lengths to which the argument over classification went are

[56]"The act exempts those engaged in professional employment and the administrator requires that to qualify as professional an employee's work must be of a nature usually prepared for by a long course of specialized training and must carry a salary of at least $200 per month. The court (below) rejected opinion evidence that reporters and editors are professional workers, and it is contended that this regulation also was arbitrary or capricious. It was, however, shown and it is, perhaps, common knowledge, that few newspaper employees are graduates of specialized schools of journalism, and there are editors of long experience and trained judgment who, agree-

illustrated in *Walling* v. *Sun Publishing Co.,* the case just noted, before it reached the appellate court. Here a newspaper and radio station establishment was found generally violating, evading, or ignoring the wage and hour law, pleading that a $30-a-week reporter, a $140-a-month radio engineer, and a $120-a-month "program director," were exempt as professionals. The court rejected the plea.

The ANPA crusade in the wage and hour law matter was not popular. Reporting to his client at the 1944 convention, Hanson described the extent of the government power over the newspaper business inherent in the wage and hour law, and gave his version of the way his argument was being received:

> The question is, do you want such a life and death power asserted over you? I can't conceive of your wanting it. Yet I have been utterly amazed that in the four years these issues have been before the courts, with isolated exceptions, practically all of the editorial comment that I have seen has been editorial comment giving this Association plain unshirted hell for even challenging the power of Congress to destroy the press.[57]

All the issues agitated in the lower courts reached the Supreme Court of the United States in two cases decided the same day, which affirmed the doctrine of *Associated Press* v. *NLRB.*[58]

The court disposed of the issue of freedom of the press in this way: In the *Mabee* case, the rule in *Grosjean* v. *American Press Co., Inc.,*[59] which killed a special newspaper tax, was pleaded against the constitutionality of the wage and hour law. The Louisiana papers had been classified for purposes of the tax, and the court held that this tended to restrict circulation. But in the *Mabee* case the classification was upheld, and the court pointed out that no special attention had been given the press in this law.

The Flaw in the Special Privilege Plea

In the *Oklahoma* case, it was explained, in rejecting the same issue, the petitioner contended that the exemption of employees of small newspapers was an illegal classification because the First Amendment forbade Congress to "regulate the press by classifying it" at all; "and in any event that it cannot use volume of circulation

ing that 'the proper study of mankind is man,' likewise believe that the only practical school of journalism is the newspaper office." *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 449 (1944). An interested party in this proceeding was, of course, the American Newspaper Guild, which would be affected by the interpretation requested by the applicant and by the ANPA.

[57]American Newspaper Publishers Association, *Convention Bulletin* No. 4-1944, Pt. IV, p. 174.

[58]*Mabee* v. *White Plains Publishing Co., Inc.,* 327 U.S. 178 (1946); *Oklahoma Press Publishing Co.* (and *News Printing Co. Inc.)* v. *Walling,* 327 U.S. 186 (1946).

[59]297 U.S. 233 (1936).

or size as a factor in the classification. . . . Nothing in the *Grosjean* case forbids Congress to exempt some publishers because of size from either tax or a regulation which would be valid if applied to all."[60]

The court noted that the freedom of the press interpretation "colored" almost all of the petitioner's argument, and described the view as a "primary misconception." The application of the Wagner Act to the press was related by the court to the wage and hour bill in purpose, and the latter was described as a more direct approach to eliminating low wages and long hours. "The Amendment does not forbid this or other regulation which ends in no restraint upon expression or in any other evil outlawed by its terms and purposes."[61]

The extent of circulation in interstate commerce made no difference. In the *Mabee* case the paper had a circulation of 9000 to 11,000, but only forty-five copies a day went into interstate commerce. The state court, which had heard the case below, applied the doctrine of *de minimis,* but the Supreme Court reversed on that point. The interstate nature of the news report, the use of mails, and the interstate transportation of supplies placed the newspaper under the law. Said the court:

> Though we assume that sporadic or occasional shipments of insubstantial amounts of goods were not intended to be included in that prohibition, there is no warrant for assuming that regular shipments in commerce are to be included or excluded dependent upon their size.[62]

What Congress had done, the court explained, was not to exempt all papers with a small out-of-state circulation, but only papers with a circulation of 3000 or less because they were in commerce to a very slight extent.[63] Justice Murphy dissented, his few words being the first spoken from behind the high bench that favored this contention. He did not think that Congress intended to apply the law to small local properties, obviously in commerce though they might be. He said:

> Concededly Congress has not excluded commerce of small volume from the coverage of the Fair Labor Standards Act by "express prohibition." But certainly the "fair implication" is one of exclusion. On numerous occasions we have pointed out that scope of its commerce power . . . and that Congress plainly indicated its purpose to leave local business to the protection of the states so far as wage and hour problems were concerned. In my opinion, a company that produces 99½ per cent of its products for local commerce is essentially and realistically a local business. True, one-

[60] 327 U.S. 186, 194 (1946). [61] *Ibid.*, 193.
[62] *Mabee* v. *White Plains Publishing Co., Inc.*, 327 U.S. 178, 181–82 (1946).
[63] *Ibid.*, 183.

half of 1 per cent of its production is for interstate commerce, thus subjecting it to the constitutional power of Congress when and if exercised. But that fact does not make it any less a local business, which we have said Congress plainly excluded from this act.[64]

Throughout the litigation, the administrator had been forced to meet efforts to nullify his subpoena power, to deny him access to a newspaper's records without first proving coverage of the act, and to challenge his regulations. In the showdown, all these points were cleared up: He could not delegate his subpoena power, but he could have access to books, because his powers were analogous to those of a grand jury, and he had the right to investigate on general information and belief; his regulations were pronounced reasonable and were enforced:

> The very purpose of the subpoena and of the order, as of the authorized investigation, is to discover and procure evidence, not to prove a pending charge or complaint, but upon which to make one if, in the administrator's judgment, the facts thus discovered should justify doing so. . . . For to deny the validity of the orders would be in effect to deny not only Congress' power to enact the provisions sustaining them, but also its authority to delegate effective power to investigate violations of its own laws, if not perhaps also its own power to make such investigations.[65]

Only one decision by the courts indicated any deference for the newspapers as creatures of the First Amendment. The circuit court of appeals, confronted by the administrator's request to enjoin the interstate circulation of the Jackson *Sun,* remembered that it was on hallowed ground. The press was not subject to prior restraint except for very grave substantive reasons, and this part of the order had to be amended. As the court explained it:

> No case has been cited and none has been found by independent research which holds that a newspaper may be barred from the channels of commerce as a means of effectuating an administrative regulation, or a court decree enforcing an administrative order. If the Congress has power to withdraw from a newspaper publisher the right to disseminate news and opinions as a means of compelling compliance with the law, then it has likewise the power to withdraw from newspaper publishers, and all others, any or all of the fundamental rights preserved by the Constitution.[66]

With that crumb of comfort and their memories of Sutherland, Van Devanter, McReynolds, and Butler, the publishers, large and small, had to be content.

[64] *Ibid.,* 185–86.
[65] *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 201 (1946).
[66] *Sun Publishing Co.* v. *Walling,* 140 F. 2d 445, 449 (1944).

CHAPTER V

Taxes and Freedom of the Press

THE MARK OF HUEY P. LONG

THE press makes a business of the dissemination of news and opinion. Sooner or later its activities touch everyone. To scramble the proverb, the press is a good wind that blows somebody ill all the time, and the resentments it raises in the day's work last longer than the memory of its good works.

When the press angers its ordinary customers it may suffer loss of patronage, although in metropolitan areas the size of the newspaper business and the diversity of its clientele help to cushion it against ordinary commercial pressures. But when it angers a person influential in the legislative branch of government the reprisal may be indirect and backed by the power of the state. That is why it is so important to the press, dependent as it is upon its own earnings for its independence, that the First Amendment be made to mean more than simple freedom from prior censorship.

In Louisiana, in 1934, the dictatorship of Huey P. Long's machine was meeting annoying opposition from the larger daily newspapers in the state. In retaliation the legislature controlled by the Long machine enacted a special 2 per cent tax on the gross advertising income of papers with a circulation of 20,000 or more. Twelve principal newspapers in this class had opposed the Long regime. Out of 163 newspapers in the state, there were only 13 with a circulation which made them subject to the special punitive tax.

After the introduction of the measure in the legislature, but before its final passage, a circular was placed on the desks of members of the legislature saying in part:

> The lying newspapers are continuing a vicious campaign against giving the people a free right to vote. We managed to take care of that element here last week. A tax of 2 per cent on what newspapers take in was placed upon them. That will help their lying some. Up to this time they have never paid any license to do business like everybody else does. It is a sys-

tem these big Louisiana newspapers tell a lie every time they make a dollar. This tax should be called a tax on lying, 2 cents a lie.[1]

The circular bore the names of the governor, Oscar K. Allen, and United States Senator Huey P. Long.

The newspapers did not state the amount of the tax, but in the discussion of federal jurisdiction in their brief they said the three-thousand-dollar minimum would accrue against the *Times-Picayune* in about two months, against the Item Company, Limited, in about three months, and against the Capital City Press, the Journal Publishing Company, Incorporated, the News-Star-World Publishing Company, Incorporated, and the Times Publishing Company, Limited, in about a year.

The gross receipts of the American Press Company, the appellee which gave its name to the case, were $82,613 between October 1, 1933, and September 30, 1944. On this basis its annual tax would have been $1652.26.

The newspapers took their case to federal court without bothering to test the law under the Louisiana constitution.[2] They argued, however, that although the state constitution demanded absolute uniformity in license taxes, this was applied against the newspapers alone, and then only against those of a certain size; that it violated the First Amendment as applied to the states by the Fourteenth, under the decision in *Near* v. *Minnesota* and the kindred provisions in the Louisiana constitution; and that it violated the equal protection of the laws clause in the Fourteenth Amendment.[3]

Taxes Affect Circulation

Where the United States district court had found for the newspapers under the equal protection of the laws clause, the United States Supreme Court decided the matter squarely under the First Amendment, as articulated by the Fourteenth. Justice Sutherland, who wrote the opinion,[4] gave a historical account of the reasons why newspapers hate and fear special taxes, and ignored completely the equal protection of the laws argument.

The opinion found, as one violation of the First Amendment, that

[1]Appellee's brief, *Grosjean* v. *American Press Co., Inc.*, p. 9.

[2]A somewhat involved argument took place among the lawyers over federal jurisdiction. Eberhard P. Deutsch, one of the attorneys for the newspapers, discusses this problem in "Federal Equity Jurisdiction of Cases Involving Freedom of the Press," *Virginia Law Review*, Vol. 25, No. 5 (March 1939), p. 507. This problem also arose in the *Hague* case. In the *Grosjean* case, jurisdiction with reference to newspapers with a tax of less than $3000 a year had not been questioned in the lower courts.

[3]Appellee's brief, *Grosjean* v. *American Press Co., Inc.*, p. 3.

[4]*Grosjean* v. *American Press Co., Inc.*, 297 U.S. 233 (1936).

the special tax discouraged circulation.[5] This concept was to be widely used in the Jehovah's Witnesses cases and by Elisha Hanson, the general counsel for the ANPA, in the cases which he pressed against general state taxes. The tax, Justice Sutherland said, could destroy both advertising and circulation.

Louisiana had argued that the English common law, taken over by the American courts, conferred the right to license newspapers and to apply to them special tax levies. Justice Sutherland replied that such taxes in England were a direct cause of civil unrest and a part of the objectionable government policy which finally produced the American Revolution.[6] It was asserted that the American government did not adopt this feature of the English common law, and that the Constitution forbids state and national governments to adopt "any form of previous restraint upon printed publications" by either tax or license. Said Justice Sutherland for the court:

> The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern.[7]

The opinion adopted Judge Cooley's test, that the evils to be checked were not merely those of censorship, but any "action of the government . . . which . . . might prevent such free and general discussion of public matters as seems absolutely essential to prepare the public for an intelligent exercise of their rights as citizens."[8]

The Louisiana tax, said the court, was directed especially at the newspapers, and had "a long history of hostile misuse against the freedom of the press." It was bad not merely because it hurt the publishers, but because

> it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of the constitutional guaranties. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.[9]

[5] *Ibid.*, 245.
[6] *Ibid.*, 246.
[7] *Ibid.*, 250.
[8] *Ibid.*, 249–50.
[9] *Ibid.*, 250.

The attempt of the Long machine to penalize the newspapers which blocked its conquest for unchecked political power therefore failed.

The Importance of Classifying Newspapers

The *Grosjean* case is significant not only because the Constitution has proved sufficient defense against this kind of tyranny, but because it denied directly that the English common law is to be read into the law of the press in this country. The point has been discussed in Chapter I; here it is sufficient to say only that the docile acceptance of the common law in the courts was one of the big obstacles to an expanding conception of freedom of the press.

In addition, the *Grosjean* rule forbade a classification of the metropolitan newspapers which would separate them from the smaller dailies and weeklies for purposes of taxation. The federal government had made such a separation in the Fair Labor Standards Act of 1938, and the Social Security Act had set up a division based on the number of employees. In Louisiana, however, the purpose was not to regulate the flow of interstate commerce but to punish opposition newspapers.

If state or even federal government can get the courts to sanction a division of the newspapers into classes for legislation and taxation, the First Amendment will be weakened, at least insofar as it fulfills Justice Sutherland's definition, through economic pressure. This is important not only in the field of taxation, but elsewhere.

When the Missouri Press Association, made up of large and small newspapers, both daily and weekly, intervened in *State ex rel. Pulitzer Publishing Co.* v. *Coleman,* it had to fight at the next term of the General Assembly a bill giving jurisdiction to try libel suits in any county in which a newspaper had circulation. The proposal, wholly punitive in design, was defeated only after a prolonged struggle, largely through the influence of small-town publishers with members of the legislature from their home communities.

If the metropolitan newspapers, whose size and resources make them especially annoying to legislative leaders during periods of controversy, could be separated under the Constitution from their smaller but more numerous country cousins, they would be at the mercy of legislators who feel either thwarted or persecuted by the newspapers, and any action taken would probably spring not from statesmanship but from human irritation.[10]

[10]The case is reported in 152 S.W. 2d 640 (1941). The information and comment come from the author's experience as manager of Missouri Press Association.

THE CHALLENGE TO PRIVILEGE TAXES

The court passed on the application to newspapers of sales taxes in two cases, *Giragi* v. *Moore*[11] and *Arizona Publishing Co.* v. *O'Neil*.[12] Backed by the American Newspaper Publishers Association, and watched with interest by newspapers everywhere, these papers argued immunity under the First Amendment for the same legal reasons as those given in *Grosjean*.

Speaking of these cases in 1938, Hanson said that eight states—Connecticut, Florida, Illinois, Indiana, Kansas, Mississippi, Arizona, and Oklahoma—had laws like the Louisiana tax of Huey P. Long, and he included a tax in the District of Columbia as a ninth. At that time, he criticized the preparation of *Giragi* v. *Moore* in the trial court for failing to make the most of the opportunity for a full-scale test of this type of license and privilege tax as applied to newspapers. Hanson explained his opposition in terms of a licensing provision in each of these state laws, rather than any objection to general taxation. He said:

> I think every one of these laws should be contested. I particularly believe that newspaper publishers irrespective of the emergency, should resist any form of licensing that would set a precedent in doing business, no matter whether the fee for the license is $1 as it is in Arizona, or $10 as it is in the District of Columbia, because if the legislature had the power to compel you to take out a license to do business, it has the power to lay down the conditions and the terms of that license.[13]

He asserted, further, that the courts will not examine the wisdom of the use of the power, once licensing traditions are established. He urged the publishers to challenge the laws before applying for the license, saying that otherwise they will set up a body of precedent that will "be very difficult to overcome in the future."[14]

The Arizona tax imposed an annual privilege tax of 1 per cent of the gross proceeds from sales or gross income from the business "upon every person in business."[15] The newspaper at first argued that the legislature had not intended to include advertising receipts, and sued the state tax commission under the declaratory judgments law. It asserted, though a legislative record sufficient to aid it substantially was difficult to obtain, that the legislature meant by "publishing" and "publication of newspapers"—terms used in the statute—to apply the

[11] 301 U.S. 670 (1937).
[12] 304 U.S. 543 (1938).
[13] Anonymous, "Free Press Talk and Ad Drive Features ANPA Week," *Editor & Publisher*, Vol. 71, No. 18 (April 30, 1938), pp. 7–8.
[14] *Ibid.*
[15] 58 P. 2d 1249 (1936).

tax only to income from subscription sales, and that there was no intention to tax the income from advertising.[16]

The court overruled this contention and let the tax apply to the gross proceeds without reservation. Upon application for rehearing[17] it listened to arguments on the constitutional issue. The *Grosjean* case was cited as flatly forbidding the levying of such a license tax, but to no avail.

General Tax Laws

The court replied that *Grosjean* concerned a type of legislation which was hostile to the press and belonged in the class of the objectionable taxes on knowledge. Prior restraint was practiced by the *Grosjean* case statute through arbitrary classification applying the tax only to papers with a circulation above 20,000. The Arizona law, the court said, was not a deliberate and calculated scheme to limit the circulation of Arizona newspapers. After reading *Grosjean,* it believed that no classification which was intended to penalize the press would ever be regarded as due process of law.

The Arizona court then took up Hanson's contention that the license feature of the law was unconstitutional. The only provision here, it was explained, was the payment of a nominal fixed fee, unvarying and payable but once. "The tax commission has no control over newspapers."

Then the real issue was stated as the court saw it:

> The Supreme Court would have to say in the plainest and most unequivocal language that the burden of taxation should not be borne by the press and all others taxed before we would believe that Court intended such a rule. Certainly it has not been so stated in the *Grosjean* case.[18]

To fall, a tax must clearly have been passed as a "form of previous restraint upon printed publications or their circulation." Size would not matter if that defect was present, the court said. The Arizona sales tax aimed solely at raising revenue and was, therefore, not prohibited by considerations of due process of law.

The government was just as fair-minded about applying taxes to the press in Queen Anne's day, too, for it was then explained that the only purpose was to raise revenue. But in a day when great stress is placed upon preventing consolidation and concentration in the newspaper business, this reality deserves emphasis: Taxes, fair or unfair, discourage business enterprise and limit the circulation of newspa-

[16] *Ibid.*, 1250.
[17] 64 P. 2d 819 (1937).
[18] *Ibid.*, 822.

pers. Society should not hesitate to apply a privileged tax status to the press if such treatment will help to obtain better mass communications for purposes of democratic government.

When a publication raises the question, Does this tax, as it operates today, abridge freedom of the press?, the answer the courts give need not be "Yes" for the constitutional requirement to be satisfied. Because the press is extremely sensitive to economic pressures, this is another place for the *Schneider* rule:

> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation.[19]

The burden of proof should be upon the government when any tax which affects the press is challenged as infringing freedom of the press. Taxes on the press, even those innocently passed, in short, are and should remain subject to review as a constitutional question, even though the greatest responsibility lies with the legislative branch of government.

An Invalid Municipal Tax

In a *per curiam* opinion, the Supreme Court of the United States dismissed *Giragi* v. *Moore* on appeal for want of a substantial federal question.[20] The same questions were raised in the district court and the United States Supreme Court in *Arizona Publishing Co.* v. *O'Neil,* and with the same result.[21]

An annual license tax on newspapers imposed by the city of Tampa was held void when the supreme court of Florida ruled on *City of Tampa* v. *Tampa Times Co.*[22] This case concerned an ordinance with a tax bracketed as follows: less than 10,000 circulation, $40 a year; from 10,000 to 30,000 circulation, $500 a year; more than 30,000 circulation, $700 a year.

The *Times* objected that the tax was based on circulation and therefore defective under the *Grosjean* rule, and that the basis of classification was not reasonable. The court declared that no license tax against a newspaper, when assessed on a scale graduated by size of circulation, even though enacted without being arbitrary or unreasonable, was valid.

When the license tax was re-enacted and scaled to gross receipts, however, it was approved by the Florida court on the authority of *Ari-*

[19] *Schneider* v. *State,* 308 U.S. 147, 161 (1939).
[20] 301 U.S. 670 (1937).
[21] 22 F. Supp. 117, 304 U.S. 543 (1938).
[22] 15 So. 2d 612 (1943).

zona Publishing Co. v. *O'Neil.* The annual tax approved was ten dollars on the first three thousand dollars of receipts and one dollar per one thousand dollars of additional gross sales. Wholesale dealers in newspapers and magazines were taxed thirty cents for each one thousand dollars of gross sales.[23]

The contrasts between the treatment of the press and that of religious evangelists under the First Amendment, as pictured by Justice Reed in *Murdock* v. *Pennsylvania* and Justice Jackson in *Douglas* v. *Jeannette,*[24] were further emphasized by a South Dakota supreme court decision which exempted a Jehovah's Witness from collecting and paying a sales tax on the pamphlets which he sold from door to door.[25]

Justice Frederick A. Warren, who wrote the unanimous opinion, said that a state may not tax a right guaranteed by the federal Constitution, and this particular sales tax was based on the privilege of following certain occupations. If it were applied to activities held to be those of free exercise of religion by the terms of the First Amendment, it would be destructive in effect and hamper the exercise of a freedom guaranteed by the Constitution, Judge Warren said.[26]

If the profit motive of the press deprives it of the full sweep of constitutional protection, we are confronted with a classification not authorized by the Constitution or adequately recognized in the deliberations of the legislatures and the courts. A society using the profit system to stimulate the production of needed goods and services certainly should be quick to recognize symptoms of malfunction in the economic system of the press and look searchingly at burdens imposed by the taxing power.

And if we allow the differentiation between the newspaper's editorial function and its business or manufacturing function, as established in the Wagner Act cases, new questions of size confront us. At one point, a printing plant is as highly personal an adjunct of an editor as the knapsack a Jehovah's Witness hangs about his neck. At another point, the printing plant is a factory big enough to be classed as a business and taxed as a business without fear of interfering with its freedom of operation.

[23]*Tampa Times Co.* v. *City of Tampa,* 29 So. 2d 368 (1947).
[24]See Chapter VII.
[25]*State* v. *Van Daalan,* 11 N.W. 2d 523 (1943).
[26]*Ibid.,* 526.

CHAPTER VI

Freedom of the News

HOW SHALL LIBERTY BE ACHIEVED?

WHEN American business, glamorized and romanticized by her association with the remarkable physical resources of America, was caught out in the raging storm of the 1930's, she lost more than the curl in her hair. Something of the sparkle in her eye was veiled, and a deep-seated apprehension over the future course of affairs affected her speech and manner, lately so prone to expansive optimism.

The apprehension was fully justified. Practical men of affairs, who had long run the government, had confined to the realm of political theory the long-standing argument over the ends and aims of government. But suddenly men more learned in the theory of government than in its practice moved into places of power, and added the gropings of philosophers to the wanderings of statesmen. The freedom to be let alone was increasingly modified by the imperatives of government intervention in behalf of the common welfare, and business, accustomed to the arduous but relatively simple task of earning a dollar for itself, now found a new majority stockholder on the board of directors in the shape of the public interest. The new stockholder voted both money levies and operative restrictions on the firm in the public interest and waved aside protests. Failure to carry the new burdens would merely result in bankruptcy or further loss of control.

The newspaper business was no exception. At trade association meetings, the good John Barleycorn gave way to the New Deal as the leading cause of hangovers, and the agents and *provocateurs* of special privilege who infested these meetings helped the publishers return home after each gathering with an aggravated sense of political and economic insecurity.

In this setting the perennial question[1] of the degree of restraint on

[1]See William F. Swindler, "The AP Anti-Trust Case in Historical Perspective," *Journalism Quarterly*, Vol. 23, No. 1 (March 1946), p. 40.

trade present in the bylaws of the AP came under the eyes of the government. The case which resulted was associated with the names of Marshall Field, one of those who held to a truly mild philosophy of government intervention,[2] and Robert R. McCormick, whose public actions indicated that he hated and feared with all his heart any government he could not personally control. One of McCormick's areas of particular influence was the Republican party of Illinois, and more than a little interest was added to the battle of the titans by Field's affiliation with the Democratic party and his evident sympathy for the leadership of President Roosevelt.

The showdown involving the AP came over Field's membership application on behalf of his Chicago *Sun,* which he had established in the morning field to compete with the Chicago *Tribune.* It turned out that Field could not obtain membership without McCormick's consent, unless government intervened in its guardianship of the public interest to force an amendment of the bylaws. The government did so, the courts sustained the intervention, the bylaws were amended, and Field and other publishers hitherto restrained gained access to AP service.[3]

It would distort the subject of government intervention to discuss only its orientation to the Field-McCormick controversy, a controversy which despite its public interest was considerably less significant than the theories of government which were utilized in deciding the case in court. For it is a subject that as yet does not yield to analysis in terms of conservative and liberal points of view. Two notably liberal persons on record as disagreeing on the proper role of government were Arthur Garfield Hays and Morris Ernst, both associated for years with the defense of civil liberties.

These men subscribed to the "market place of thought" credo expressed by Justice Holmes,[4] and both felt that the market must be kept open for the test to be fair. They differed over economic rights, however, for Hays did not consider the private curtailment of freedom of press inherent in the present system.[5] Chain ownership of

[2]This philosophy is well outlined in Marshall Field, *Freedom Is More Than A Word* (Chicago: University of Chicago Press, 1945). On page 10 Field says: "We must continue to find ways of keeping social power sufficiently divided, so that no individual or group can come near to usurping over-all control and at the same time not so atomized that effective planning and action become impractical. . . . the power of society must be sufficiently divided so that we are conscious of being the authors of the law we obey."

[3]*United States* v. *Associated Press,* 52 F. Supp. 362 (1943) and *Associated Press* v. *United States,* 326 U.S. 1 (1945).

[4]"The best test of truth is the power of the thought to get itself accepted in the competition of the market . . ." *Abrams* v. *United States,* 250 U.S. 616, 630 (1919).

[5]Philip Schuyler, "2 Civil Liberties Champions Clash on Press Freedom," *Editor & Publisher,* Vol. 77, No. 50 (December 9, 1944), p. 7. This article digests statements made to the Commission on Freedom of the Press, of which Robert M. Hutchins was chairman.

newspapers and radio stations simply meant improved public service to Hays, but Ernst looked upon business concentration in the communications field as the major source of trouble. The diversity that Bentham stressed was to Ernst inseparable from any consideration of the problem, and he felt that government must take positive steps to assure it. Hays said:

> I insist that just as soon as you try to limit people from expressing their opinions because they have more money than someone else, you are dangerously interfering with freedom. . . . Despite the so-called threatening economic domination of media of communication, it is a fact that in this country minority groups always get opportunities to express their views out of all proportion to their numbers.[6]

Ernst proposed that government extend subsidies through tax concessions and in other ways "to permit those with less money to express their ideas in the market place." In this respect, he was carrying to an extreme the line of thought developed by Clarence Streit, somewhat earlier, when Streit told the League of Nations that such subsidies were needed to put newspapers into the hands of the people who edited them.[7] Said Ernst:

> A free press can best be safeguarded, and democracy most faithfully served, by diversity. Once we recognize this truism, our policy dictates itself. We must initiate and support everything that contributes to diversity and combat anything that operates against it. We must create conditions that will cause individual mouthpieces of opinion to multiply and flourish and discourage multiple ownership and concentration of control.[8]

In general, the government adopted the position of Ernst and the AP that of Hays in the court showdown. The government was victorious.

THE *TRIBUNE* AND THE *SUN*

The Chicago *Tribune* is more than one hundred years old and is one of the largest and most successful newspaper properties in America. While it admits affiliation with the Republican party, it also asserts a ninety-nine-year record of independence in political and other affairs. Says a sponsored publication:

> Since there has been a Republican Party, The *Tribune* has been attached to Republican principles but it has never been and has never

[6] *Ibid.*, p. 58.

[7] League of Nations Publications (General, 1932:7), *Cooperation of the Press in the Organization of Peace*, pp. 4–6.

[8] Schuyler, "Civil Liberties Champions Clash," *Editor & Publisher*, p. 58. Ernst discusses his point at length in his book, *The First Freedom* (New York: Macmillan, 1946), Chaps. III and IV.

sought to be a party organ. Its views are its own. No outside influence has ever dominated its thought and expression.[9]

In an address to the Chicago Church Federation in 1924, McCormick defined the newspaper. Said he:

> The newspaper is an institution developed by modern civilization to present the news of the day, to foster commerce and industry through widely circulated advertisements, and to furnish that check upon government which no constitution has ever been able to provide.[10]

The publisher omitted from his definition any mention of the entertainment function, for which his paper is famous because of its comic strips and features. And elsewhere he made clear that if it isn't published for profit it isn't a newspaper; ". . . unless a newspaper is conducted for profit it is not a unit in itself, but part of something else," he wrote.[11]

Mark Ethridge, editor of the Louisville *Courier-Journal,* once compared the extremes of the *Tribune* to the unnatural paleness of some of the newspapers. He wrote:

> I am not by any means an admirer of the *Chicago Tribune,* but I have always felt that those who said its great hold came from its comic strips and other features were wrong; it possesses an animal vigor which manifests itself in a thousand ways I wouldn't want to imitate, but that nevertheless obviously appeals to readers because it is a departure from a milk and water daily without a purpose save to make money.[12]

The animal vigor of which Mr. Ethridge spoke is used, in the *Tribune* news technique, to slant the news, as through a lens, to raise a blister and then to belabor the blister until the soreness spreads over the whole body. Favorite blister-raising areas with the *Tribune* are on the people in charge of the various agencies of government. No one has ever been quite able to say whether the *Tribune*'s motive is to secure better government, or merely to chastise those of any and all parties who do not follow the *Tribune* line.

A committee of Colonel McCormick's fellow citizens in Chicago, acting through the Chicago chapter of the Union for Democratic Action, published a pamphlet in 1942 examining the *Tribune*'s wartime career.[13] The table of contents is indicative:

[9]From the foreword to *Thunderer of the Prairies,* edited and published by the Chicago *Tribune,* 1944.

[10]*What Is a Newspaper?* (Chicago: Chicago *Tribune,* 1927), p. 32.

[11]*Ibid.,* pp. 15–16.

[12]"Ethridge Sees Postwar Years Challenge to Press," *Editor & Publisher,* Vol. 78, No. 42 (October 13, 1945), p. 9.

[13]*The People* v. *The Chicago Tribune* (Chicago: Union for Democratic Action, 1942).

THE INDICTMENT

The *Tribune* betrays military secrets
Colonel McCormick—newspaper tycoon and tin soldier
The *Tribune* parrots the Axis propaganda line
The *Tribune* adopts home-grown fascists
The *Tribune* pulls the strings for its puppets, Brooks and Day
The *Tribune* endangers the winning of the war and the peace
What Shall We Do?

In the discussion under the topic, "What Shall We Do?" the Union for Democratic Action recommended that people refrain from buying the *Tribune,* but the *Tribune*'s circulation did not suffer from the recommendation.

Marshall Field rendered a bill of particulars against the *Tribune* in explaining why he founded the *Sun* and why he sought AP membership. He asserted that the *Tribune* was friendly to Italian fascism, because it exalted order above democracy, and to German fascism for somewhat the same reasons. In discussing the Hitler order, the *Tribune,* according to Field, even acquiesced to control of the press and overlooked the horrible oppressions that went with "order."

The *Tribune,* according to Field, smeared as a Red anybody who disagreed with it, even Jane Addams. Field said that the *Tribune* and its publisher embraced with approval Mrs. Edith Dilling's book, *Red Network,* and advocated a political policy of Anglophobia, Russophobia, and isolationism.

Field related that the *Tribune* was friendly to Roosevelt until the forty-hour week was said to apply to newspapers and then openly hostile when the administration recognized the Soviet Union.[14] Said Field:

> These are evidences of "fairness"—of a spirit of "trusteeship" for the "people's right of freedom of the press"—in a paper holding a monopoly for many years in Chicago's morning field. Is it any wonder, then that from time to time, over a considerable period, groups of Chicago citizens approached me in person and in writing, indicating their desire for a morning newspaper which would represent opinions, and report news, in a very different manner from the *Tribune*?

The *Tribune,* when it replies to criticism, often takes the course of reprinting the material criticized as examples of its outstanding devotion to Americanism and individualism. In 1944 it issued a 156-page book reprinting many of the cartoons and editorials which were most resented by its critics. And in the foreword, it said:

[14]Field, *Freedom Is More Than A Word,* pp. 106–8, 110, 112.

The *Tribune* has always been a fighting newspaper and an outspoken newspaper. Today it has by far the largest circulation among standard newspapers in the United States. There has never been a time when it did not have enemies. The *Tribune*'s leading position in the country and especially in the middle west has made it a shining target for the jealous and the vengeful. They have often been guilty of gross misrepresentation of its views.[15]

The assertions from both sides are cited not in an effort to arrive at a balance sheet of *Tribune* virtues and vices—a task beyond the scope of this work—but simply to show that the antitrust suit against the AP was and remains rooted in national political and social issues even while, at the same time, the suit was of great importance to constitutional interpretation. The *Tribune* and the *Sun* were contesting in the theater of the national welfare, and they were also competing for the right to give news to the people of Chicago with a certain kind of treatment predetermined by the publishers. And when Field asked for membership in the AP in a field where multiple morning and multiple afternoon memberships had always been the rule, he had to fight for it like everything else he wanted which lay partly or wholly within the domain of the *Tribune*.[16]

THE CASE IN DISTRICT COURT

The AP was incorporated in New York, and the case was first heard in district court there, with Judges Learned Hand, Thomas W. Swan, and Augustus N. Hand sitting. The charge was violation of the Sherman Act in the sense that the bylaws were in restraint of trade, and the case was heard under a motion for summary judgment—that is, upon an agreed statement of facts and without the use of a jury.

The bylaws admitted by AP, which became the basis for the holding that its operations were in restraint of trade, provided for the admission of members by a majority vote. But applicants competing in a field where there was already an AP member were to be admitted only upon payment of 10 per cent of the total assessments

[15] *Thunderer of the Prairies*, p. 3.

[16] In contrast to the *Tribune-Sun* fight, there is the quick disposal by the Chicago *Daily News*, to a rival Hearst paper, of a surplus AP membership acquired in the purchase and consolidation of the Chicago *Evening Post* in 1932. An article in *Editor & Publisher* on that occasion purporting to express the feelings of Frank Knox, publisher of the *News*, said: "In view of the fact that the *Daily News* already had an Associated Press membership, Col. Knox felt that it was not good public policy for only one standard-sized evening paper in a city the size of Chicago to carry AP news. . . . The sale, he pointed out, stabilized the local evening field and made it less likely of invasion by an outside competitor." Vol. 65, No. 25 (November 5, 1932), p. 6. At the time the *Sun* was established, Hearst had a surplus morning AP membership which, according to Field, could not be purchased at a reasonable price.

by AP in that field since October 1, 1900. In the case of the *Sun,* this would have meant a payment of $334,250.46; in New York, the payment in the morning field would have been $824,333.82; in St. Louis, $182,323.42. The proceeds were to go to existing members in the field. In addition to such payment, the applicant, upon demand, would be required to relinquish any exclusive contracts for news and picture services which he enjoyed.[17] Applicants for membership from a field without an existing member, or in a field where the existing member waived the payment, could be admitted by the board of directors.

The complaint against the AP also cited its purchase of Wide World Photos from the New York *Times* and its exclusive agreement with Canadian Press as violative of the antitrust laws.

The court described the extent of the AP: 81 per cent of the morning newspapers in the United States and 59 per cent of the evening papers, a total of 1274 newspapers, were members. AP papers had 96 per cent of the morning circulation in the country and 77 per cent of the evening circulation. Of the papers in the morning field with a circulation of 50,000 or more, only the Chicago *Sun* was not an AP member. AP had an annual budget of about twelve million dollars.

United Press and International News Service, the competitors of AP, were somewhat smaller, but their gross volume, added together, was nine and a half million dollars. UP and INS sold asset-value contracts to papers in lieu of exclusive memberships. This may be interpreted as a crude form of insurance against competition, requiring that any paper which subsequently bought the service in the same field should pay a lump sum to the original UP or INS contractor. About three hundred AP members also took UP service.[18]

The record showed that several papers achieved large size without AP service. The court listed among them the Chicago *Sun,* then with a circulation of 327,000, Cleveland *Press,* Pittsburgh *Press,* East St. Louis *Journal,* and Harrisburg *Evening News.* Clearly the AP could not be branded as indispensable under the antitrust laws. One other AP practice shown in the record was regarded in the complaint as restraining trade. This was the requirement that members transmit news originating in their field only to the AP.

Borderline Restraint

Having stated these facts, the district court, speaking through

[17] *United States* v. *Associated Press,* 52 F. Supp. 362, 365, 367 (1943).
[18] *Ibid.,* 366–67.

Judge Learned Hand, began the tedious task of writing an opinion within the restrictions of the summary judgment procedure. It seemed to the court that the AP membership contract, as expressed in the bylaws, was in restraint of trade. It was not a flagrant or aggravated case of violation, such as in other cases had been shown to affect price or access to indispensable facilities. But it was violation, nevertheless, and the thin steel of the court's scalpel had to be run lightly along the attenuations of the contract, like that of a surgeon cutting away ragged scar tissue in preparation for a new graft. The very lightness of the court's touch, its evident restraint and caution, showed anxiety to stay within the narrow compass of the violation in applying the remedy. While these characteristics are usually present in the decisions written by Judge Hand, here they denoted a realization that an extra jot or tittle might well invalidate the decision.[19]

No other case of restraint was found exactly like that of the AP, and the court had to apply criteria from aspects of other cases to this one. This technique led the court to the crucial bylaw covering admission of members. The court said that members were free to vote on admission of applicants as their "self interest may dictate," and that this disregarded "whatever public interest may exist." The conditions and restrictions in the bylaws, said the court, were "plainly designed in the interest of preventing competition."[20]

Could AP membership be a purely proprietary privilege, with its newspapers entitled to "the fruits of their foresight, industry, and sagacity," as might be the case with seeming restraints which did not seriously impair the public interest? At this point the idea of the interventionist state was thrown into the judicial scale. Said the court:

> Neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interests protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all . . .
>
> It is impossible to treat two news services as interchangeable, and to deprive a paper of the benefit of any service of the first rating is to deprive the reading public of means of information which it should have.[21]

[19] *Ibid.*, 368–69.
[20] *Ibid.*, 370–71.
[21] *Ibid.*, 372.

The size of AP, with its hundreds of newspapers linked in a web of exclusive exchange of news, was fatal to the argument that the bylaws had no more significance than an exclusive agreement between two newspapers or two individuals, which would not be in restraint of trade.

We need not therefore say how important the control of news in any suppositious case must be in order to demand relief: it is enough that in the case at bar AP is a vast, intricately reticulated, organization, the largest of its kind, gathering news from all over the world, the chief single source of news for the American press, universally agreed to be of prime consequence. Wherever may be the vanishing point of public concern with any particular source of information, that point is far beyond this service.[22]

The "Public Interest" Ruling

A hue and cry raised in the press as the court took the case for decision protested that the government was seeking to declare the AP a business "vested with the public interest" in order to regulate it as a public utility. The district court dismissed this argument, as presented by the AP, by showing how the old idea of public calling had been altered by *Munn* v. *State of Illinois*[23] and *Nebbia* v. *People of State of New York*.[24] AP was not held to be "clothed with the public interest," but to be a business which the public interest subjects to control for the public good.

We conclude therefore that the present by-laws of AP unlawfully restrict the admission of members; and that further enforcement of them should be enjoined. We shall not attempt to say what conditions may be imposed; we hold no more than that members in the same "field" as the applicant shall not have power to impose, or dispense with, any conditions upon his admission, and that the by-laws shall affirmatively declare that the effect of admission upon the ability of an applicant to compete with members in the same "field" shall not be taken into consideration in passing upon his application.[25]

This exclusive exchange of news of member papers was enjoined only until the bylaws were relieved of illegal restraint. That done, the court said, the news exchange would be valid. The charge of monopolistic intent in the purchase and operation of Wide World Photos was found unsupported and the arrangement was not disturbed; the exclusive agreement with Canadian Press was invalid as "securing to AP members a monopoly of the Canadian Press dis-

[22] *Ibid.*, 373. [23] 94 U.S. 113 (1877).
[24] 291 U.S. 502 (1934).
[25] *Ibid.*, 373.

patches," though the court said that liberalizing the membership rules might make the agreement nonrestrictive.

The Constitutional Issue

Since freedom of press was mentioned in the briefs and thundered in hundreds of news stories, headlines, and editorials in the newspapers, the court found a moment to dispose of that point, too: "The effect of our judgment will be, not to restrict AP members as to what they shall print, but only to compel them to make their dispatches accessible to others."[26]

Judge Swan dissented. He could see no monopoly evident, he said, because of the size and vigor of UP and INS and the record of the growth of papers wholly without AP service. A restraint which had no greater monopolistic effects than shown here could not be "unreasonable," in his estimation. Only the success of the AP in achieving worldwide scope and a leading domestic position led the majority to dub it a business engaged in a public calling and to regulate it by requiring that it admit all qualified applicants on equal terms. Imposing such a duty as this on the association should have been left to the Congress, he asserted.

The emphasis on the belief that the court had usurped the legislative power in arriving at the AP decision was widely echoed in the press, where it was prevailingly dressed in dogmatic criticism. The majority opinion, in answering the point, showed that its method was as old as the law of torts and that the judicial function in this field made necessary the drawing of inferences and conclusions which were legislative by nature.

The press criticism directed at the court was unfair because from it uninformed people might conclude that only this one court in only this one situation was exercising "legislative powers." Said Judge Hand:

> But it is a mistake to suppose that courts are never called upon to make similar legislative choices; i.e. to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.[27]

[26] *Ibid.*, 374.
[27] *Ibid.*, 370.

McCormick said that the *Tribune* would appeal the district court decision "because it believes it to be the worst decision that has ever been made in the history of the fight for freedom of speech and press."[28]

Paul Scott Mowrer, editor of the Chicago *Daily News* at the time, said that AP members had merely lost their blackball rights and that the AP could still choose its members.[29] Mr. Mowrer, who was neither a publisher nor the owner of an AP franchise, adopted a point of view seldom if ever again reported in *Editor & Publisher,* the trade magazine which gave the most adequate coverage of the story. According to the reports, hardly anyone took the court at its word, that no regulation of freedom of the press was intended or contemplated.

Clark F. Waite, president of the Southern California Associated Newspapers, said that the decision meant the "decline of *laissez-faire* and the predominance of a reformist, equalitarian or interventionist theory" by which a positive intervention of government in private local affairs was to be advanced. *Editor & Publisher* headlined Mr. Waite's remarks: "AP Decision Is Signal to Dimout For Light of Liberty."[30]

F. A. Miller, president and editor of the South Bend, Indiana, *Tribune,* asserted: "Under the New Deal citizens' rights appear to have taken a secondary place and to have become subversive to legal requirement and legal protection as they have been understood since the nation's birth." Ours used to be courts of justice, Miller added, but now they were simply courts of convenience to "foster and present advantages that would aid political desires and political selfishness."[31]

Walter M. Dear, president and publisher of the Jersey City *Jersey Journal,* former president of the ANPA, said that he saw an "apparently restless will and wish of present-day officialdom to subject the press as a whole to regulation."[32]

Clyde H. Knox of Kansas City, a part of whose investment business had been dealing in newspaper property, told a press association gathering that scaled-down values for AP memberships would result from the court decision. Said he, further:

[28]"Col. McCormick's Statement," *Editor & Publisher,* Vol. 77, No. 4 (January 22, 1944), p. 5.
[29]"Sees Dangerous Precedent in Court's AP Decisions," *Editor & Publisher,* Vol. 72, No. 42 (October 16, 1943), p. 16.
[30]Vol. 76, No. 48 (November 27, 1943), p. 8.
[31]*Ibid.,* p. 46.
[32]*Ibid.,* No. 52 (December 25, 1943), p. 27.

[It] seems that the real issue for the newspaper men to consider now is whether established news and editorial associations with long and honorable history are to become involved as defendants in the federal courts merely because some very rich man, seeking to acquire the power of a publisher and perhaps to enjoy the temporary gratitude of political associates, decides to invade any newspaper field. . . . The AP decision merely opens wide the door to all ambitious malcontents who think they have grievances against newspapers anywhere.[33]

Elisha Hanson, general counsel of ANPA, criticized the public-interest formula of antitrust suits and asserted:

If the judgement of the court be sustained and Judge Hand's opinion be carried to its logical conclusion, then the people of the United States will be confronted, just as the people of Germany today are confronted, with a government controlled press.[34]

President Roosevelt was asked at a press conference to comment on the court's decision. He declined, but asked: "Does the country club still exist?"[35]

David Lawrence, the editor of *United States News,* told the American Society of Newspaper Editors about this time that the First Amendment was out of date and needed to be strengthened and clarified. His remarks were lodged against the whole background detailed in the beginning of this chapter, and applied to the AP case only in this context. His revision would add these words to the amendment:

The grant, sale or lease of any facilities, license or privileges by the United States to the press, to radio broadcasting, to television, or to any other medium of public expression shall not vest in the Congress or in any executive agency or in the several states the power to limit, restrict or regulate the contents of any printed publication, radio program, or creative work emanating from any medium of public expression except as any of these media may offend against the common law governing fraud, obscenity, or libel, or except as acts of treason are committed and punishable under Article III, Section 3.[36]

President Roosevelt continued to criticize the handling of news by the press from time to time, describing it as slanted and influenced

[33] *Ibid.,* No. 48 (November 27, 1943), p. 8.

[34] "Says AP Ruling Will Lead to Regulation of Press," *ibid.,* No. 46 (November 13, 1943), p. 8.

[35] *Ibid.,* Vol. 77, No. 5 (January 29, 1944), p. 44. Retorted McCormick: "It is regrettable that the President continues to interfere with the courts of justice."

[36] "Lawrence Reports First Amendment Vanishing," *ibid.,* No. 18 (April 29, 1944), pp. 18, 116.

by the "counting room" and by publisher policy. Once during a press conference he pointed to several newspapers on his desk which reported events relating to his foreign policy, and said that all, in stories or headlines, were guilty of some deliberate misrepresentation or distortion of his policy.[37]

THE SUPREME COURT DECISION

In this public atmosphere the AP case was described to the people while the Supreme Court was considering it under the Sherman Act.[38] The AP's attorneys, in their appeal brief, hammered heavily at the "public utility" declaration alleged to be in the opinion of the district court, and asserted that freedom of the press guarantees extended not alone to "what the press should print" but to the protection of publishing at the stages of collecting, printing, and distributing the news. The guarantees, said the brief, prohibited discriminatory taxation, prohibited interference with distribution of news, prohibited punishment for subsequent publication, and involved the right to remain silent as well as to speak.[39] The right to remain silent was claimed as protection of the AP's desire not to disclose the copy of members before publication. The Chicago *Sun* brief supported the market place of thought credo and asked a decree revised to prevent possible denial of its rights by subterfuge on the part of the AP.

The decision went against the AP by five to three. Justice Black wrote the majority opinion and Justice Roberts wrote a dissent in which he was joined by Chief Justice Stone. Justice Murphy separately dissented. Justices Douglas and Frankfurter separately concurred.[40] The result was a judicial tribute to the lower court's opinion, for the opinions of the majority followed its reasoning closely. The critical point in Justice Black's opinion was his assertion that summary procedure was justified, and with that point passed, safely or not, the outcome was inevitable.

The opinion covered three cases heard jointly: the cross appeals of

[37]Malcolm Johnson, "Record Shows Increasing FDR Hostility Toward Press," *ibid.*, No. 28 (July 8, 1944), p. 9.

[38]It could well be stated at this point, as a matter of opinion, that the atmosphere described and the exaggerated presentation of the meaning of the AP decision have psychologically prepared the publishers and the public alike for shocks much greater than any in sight through the government intervention allowable under opinions in the case. The lovers of liberty are thus holding a public funeral and acting as pallbearers well in advance of the death of freedom. But what happens to freedom's subsequent career after her public funeral?

[39]"Four Points in AP Brief Attack 'Utility' Clause," *Editor & Publisher*, Vol. 77, No. 44 (October 28, 1944), p. 7.

[40]*Associated Press* v. *United States*, 326 U.S. 1 (1945).

the AP and the government and the case against the Tribune Company. The *Tribune* had asserted that

> the defendants are entitled to a trial of genuine issues of fact unmentioned in the findings of courts but which if found for the defendant would render this holding unwarranted.[41]

But Justice Black's opinion held that:

> None of the appellants has pointed to any disputed facts essential to a determination of the validity or invalidity of the By-Laws and the contract. Admitting the existence of both the By-Laws and the contract, their answers and their affidavits in the summary proceedings defended the legality of the restrictive arrangements, but did not in any instance deny that non-members of AP were denied access to news of AP and of all of its member publishers by reason of the concerted arrangements between the appellants.[42]

The publishers argued that considerations of freedom of the press entitled them to a "different and more favorable" procedure than the summary proceedings would allow. But the court denied that the amendment had any such effect and said that the important criterion was equal treatment under the law.

The district court, because the fact of monopoly could not be properly determined summarily, had held that the AP was not a monopoly in the strict sense of the word. Justice Black said it was sufficient that the bylaws had "hindered and restrained the sale of interstate news to non-members who competed with members."[43] As for the public utility theory, the court said that it did not hold AP a public utility regulable as such: "We merely hold that arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose."[44]

The court said that freedom to combine to keep others from publishing the news is not guaranteed by the First Amendment, and that "freedom of the press from governmental interference . . . does not sanction repression . . . by private interests. . . . The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."[45]

The decree was also affirmed as to the illegality of the Canadian

[41] *Ibid.*, 5.
[42] *Ibid.*, 5–6.
[43] *Ibid.*, 13.
[44] *Ibid.*, 19.
[45] *Ibid.*, 20.

Press contract so long as the bylaws sanctioned restraint, and the government's demand for a more specific outline of provisions to govern admission of new members was denied.

Justice Roberts' Dissent

The dissent of Justice Roberts was the heart of the controversy, for he subjected the majority opinions to such a merciless scrutiny that whatever truth and error they contained was brought into clearer outline. And it lent conviction to the vital criticism of Justice Murphy that what this case needed was a jury trial on the full scope of the facts.

Justice Roberts declined to break into its components the combined business of newspaper publishing and press association transmission. News obtained and written for local publication was no different to him than a copy of that news report processed and transmitted by wire to distant newspapers for their optional use. The size and scope of the AP were not allowed to alter his view that a cooperative exchange arrangement between individuals did not violate the Sherman Act.

Justice Roberts asserted that he could not determine from the court's opinion the basis of its holding. The opinion of the district court made only a "dubious" finding that the actual operations of the AP restrained trade and competition, and he could not discover where the lower court had held that AP had monopolized business or had unreasonably restrained trade. The facts in the record, he felt, showed that UP and INS rendered a complete and satisfactory service. This is a matter of opinion and judgment, however, and a trial would have brought out many facts denied to Justice Roberts and to the public. The words "complete" and "satisfactory" are relative in meaning when applied to press services, and expert testimony would show the extent to which they are validly applied here. At least, Marshall Field said that he had had to spend more than $425,000 in 1942 for news and pictures, and that AP service, costing only $50,000 a year, would have made possible substantial savings in his outlay.[46] "The events of life are open to all who inquire," Justice Roberts said, but Field's experience indicated that a price is attached which is worthy of notice by the court.

The AP bylaws achieved restraint because the size of the AP made it a "question of degree," the government had argued, but Justice Roberts brandished the court's opinion under the noses of the ma-

[46]Field, *Freedom Is More Than A Word*, p. 138.

jority and told them it meant that "*every* agreement which in any measure restrains trade is illegal." If that was not what the opinion meant, the court should be specific, Justice Roberts said, well realizing that further instructions to the AP on the form of its bylaws was just what the court sought to avoid in view of the limitations of the summary proceeding.[47]

Justice Roberts denied that the district court made any finding that the AP imposed any unreasonable restraint, and asserted that the majority view to the contrary was a "gloss." The opinions of both the majority and the minority here represented nothing more than sincere conclusions, with the majority being able to impose its will under the rules.

The dissent repeatedly quarreled with the majority conclusion that a paper without AP service was at a competitive disadvantage, once saying of the rival services:

> Their past growth, and their opportunity for expansion, contradict the assumption that AP has unreasonably or in substantial measure, restrained free competition. Rather, its success has stimulated others to enter the field and to compete with it.[48]

A trial would, again, have served to show whether or not Justice Roberts' conclusion was correct, or whether his last sentence, above, should have read: "Rather, its *restraint* has stimulated others to enter the field"—a statement which, if true, proves that practices frowned upon by the Sherman Act sometimes achieve paradoxical results. Likewise, when Justice Roberts showed from the record that "AP members represent 59 per cent in number and 77 per cent in circulation, UP accounts for 45 per cent in number and 65 per cent in circulation,"[49] no opportunity was provided, under summary procedure, to cross-examine witnesses on the real meaning of these figures. The clients and circulation attributed to UP were, to the extent of about three hundred papers, duplications of the AP membership, and UP was allowed absolutely no access to the news of spontaneous origin reported by those papers.

Perhaps, too, such an inquiry as a trial would have clarified or eliminated such statements as that of Justice Roberts that the "difference between the reports [is] in the way they are written," for access to the scene of the news event, in which AP reputedly enjoyed an advantage, was a consideration of no less importance than

[47] *Associated Press* v. *United Press*, 326 U.S. 1 (1945).
[48] *Ibid.*, 38.
[49] *Ibid.*, 42.

writing.[50] Justice Roberts said that if the AP was to be condemned under the Sherman Act, the UP and the INS were equally guilty, and again a wider examination of the facts was desirable. Thus the summary judgment procedure shut off a great deal of light.

As long as under the court decree the AP bylaws can set up reasonable rules for rejecting applicants and expelling members, the association is not a public utility. Field quoted Zechariah Chafee as saying that the AP ought to be open to all comers,[51] and it is difficult to share Justice Roberts' distress over the tendency in that direction which the present decision may bring. Having been convicted and made subject to a decree, the AP will live henceforth under the tutelage of the court, said Justice Roberts, and he feared that this would lead to prescription of the conditions under which "one must impart the literary product of his thought and research. . . . This is fettering the press, not striking off its chains."[52]

Nevertheless, it would seem that all businesses and all individuals live constantly under restraint of statute, whether or not a court has construed and applied the law specifically to any one business. The difference between living under the law and living under its injunction, temporary in nature and not abridging freedom to gather news and write it, is one which only fear can conjure into significant proportions.

The gravamen of Justice Murphy's dissent was that the summary judgment procedure should not have been followed. The discussion of Justice Roberts' dissent has indicated the validity of this point of view. Justice Murphy said:

> We stand at the threshold of a previously unopened door. We should pause long before opening it, lest the path be made clear for dangerous governmental interference in the future. . . . The danger lies in approving such a decree without insisting upon more proof than yet produced by the Government. If unsupported assumptions and conjectures as to the public interest and competition among newspapers are to warrant a relatively mild decree such as this one, they will also sustain unjust and more drastic measures. The blueprint will then have been drawn for the use of the despot of tomorrow.[53]

Justice Roberts' great dissent, in which he made deliberate use of assumption and conjecture as widely as did the majority, rendered as useful a service to the court as the decision may have rendered to

[50] *Ibid.*
[51] Field, *Freedom Is More Than A Word*, p. 145.
[52] *Associated Press* v. *United States*, 326 U.S. 1, 48 (1945).
[53] *Ibid.*, 59.

the cause of government intervention. In spite of Justice Black's warm affirmation of the theory that the press is entitled only to equality under the law, the First Amendment says that the freedom of press shall not be abridged; that, in short, it is entitled to preferential treatment. And he, himself, has said:

> For the First Amendment does not speak equivocally. It prohibits any law "abridging freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society will allow.[54]

SUMMARY

The restraint of the AP under the Sherman Act was framed by the widespread social and political discussion of government intervention in private affairs to assure freedom or increased social utility.

Those who believed in intervention, by and large, also held Justice Holmes' creed that the market place of thought, in which truth was counted on to emerge victor in any fair and open encounter, required a multiplicity of sources of information and discussion, representing all significant shades of thought and opinion.

Those opposed to government intervention were of several shades of liberal and conservative opinion, for some outstanding liberal advocates of freedom of communication did not credit freedom of the press with having an economic dimension which government could regulate in the public interest. Intervention of this sort was held to be mere agitation against men with money enough to operate media of information. Also in this group were the rank and file of American publishers, who were the owners and operators of the AP, and the customers, willing and unwilling, of the UP and the INS. This group had its mental orientation in the post-depression struggle between business and government, and it fought intervention as one fights for life.

The meaning of the case, however, as it was publicly described, was so exaggerated that it amounted to a premature funeral oration for freedom, and may have unwittingly prepared the public to accept actual restrictions on freedom of communication.

The case of *United States* v. *Associated Press* was heard first by a three-judge federal district court in New York, and the court allowed a motion for summary judgment. The judgment was that the bylaws of the AP, defining the conditions of membership, were on their face restraint of trade, and that an exclusive agreement with Canadian

[54] *Bridges* v *California*, 314 U.S. 252, 263 (1941).

Press to distribute its Canadian news in this country was to be restrained pending change of the bylaws. Other elements of the complaint were dismissed.

The summary procedure, however, confined the examination of facts to the very narrow range of an agreed statement and prevented an intensive exploration of the issues by trial procedure. As a result, the court's decree had to be lightly and skilfully drawn to affect only the tenuous elements of visible restraint while leaving the healthy structure of the AP unchanged. This necessity gave the decree an appearance of lightness and insubstantiality which became a main source of disagreement in the Supreme Court. The agreed statement of facts left wide opportunity for the play of the social philosophy of the sitting justices, and the case seems to have been decided by a majority anxious to preserve diversity in the market place of thought and willing to accept the limitations of summary procedure in order to do so.

As a result of the five-to-three decision and the summary procedure, a case of vital importance to freedom of the press and to national policy was gravely weakened as authority both for those seeking intervention in behalf of freedom and for those denying that such authority exists.

The effect of the majority opinion was to prevent a present member of the AP from raising the question of local competition, under the bylaws, when an application for membership is up for consideration. The service of AP therefore must be furnished in the future to other papers in a field with old members without mere competitive discrimination.

CHAPTER VII

The Devious Ways of Censorship

THE COURTS AS ARCHITECTS OF RESTRAINT

The authors of the Constitution considered the master matrix of all freedoms safe in the liberty-loving traditions of state governments. A government operating in a knowledge of local conditions was certain to respect the basic freedoms, while a distant government was undependable in this respect. State guarantees were adequate and unequivocal. The spirit of liberty resided in the states and not in the national government, which was of such limited powers that it could never become a menace to freedom of speech and press. At least, so ran the argument.

But the states, as Madison's experience with the Virginia and Kentucky Resolutions proved, were not unwilling to subordinate the basic guarantees to partisan political argument. The political revolt that ended the Alien and Sedition Acts merely removed the federal government from an advantageous position in the field of restraint and left the states, with their claims of special competence and special interest, to become the leaders in legislation affecting the press. The federal government had to be content with leadership in its fields of special authority, such as the post office and post roads.

A high point in state efforts to regulate the press was Minnesota's gag law, which was held unconstitutional in *Near* v. *Minnesota ex rel. Olson.*[1] After that opinion, the worst of state abuses no longer enjoyed the protection given them in *Patterson* v. *Colorado,*[2] and a day was coming when the states were to be held as strictly accountable for liberty as the federal government. In fact the *Near* case is a great monumental pylon at the extreme end of freedom's orbit and, that point safely passed, conditions have become increasingly favorable.

In company with its predecessor, the *Gitlow* case,[3] *Near* v. *Minne-*

[1] 283 U.S. 697 (1931).
[2] 205 U.S. 454 (1907).
[3] *Gitlow* v. *People of State of New York,* 268 U.S. 652 (1925).

sota applied against the states the sanctions of the First Amendment through the Fourteenth. It eliminated a statute which had authorized prior restraint of publications considered of undesirable character by the courts.[4] The statute had been conceived to put an end to a galling little sheet dedicated mostly to smears of public officials. The editors were cited in due time and brought into court under a show-cause order backed by a temporary injunction freezing all activity of the publication. Upon completion of the hearing the injunction was made permanent, but Near could reopen his newspaper at any time if he could convince the court, who was now his master, that he would operate a newspaper lacking the objectionable features loosely indicated in the statute.

Chief Justice Hughes, writing for the court, found the statute to be almost the only one in American history which applied prior censorship to comment on alleged wrongdoing of public officers. The claim that the statute was made constitutional by allowing the publisher to plead the truth of his charges was disallowed. Said the court:

> It would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer . . . and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. . . . The preliminary freedom [to publish without restraint] . . . does not depend, as this court has said, on proof of truth.[5]

Repeatedly the chief justice stressed the belief that repression and censorship are greater evils than the disagreeable aftermath of charges of reprehensible conduct, even when those charges provoke assaults or commission of crimes. His firmness in pointing out to public officials the proper redress through libel action, slow as it might be, and his almost unstinted support of a liberal conception of a free press were to be of value not only in settling the *Near* case, but in beginning a breakup in many directions of the absolutist conceptions by which officialdom stubbornly infringed freedom of speech and press.

Indeed, he limited the proper area of restraint to time of war, obscenity, and incitement of violence, and surrounded those occasions

[4]The statute provided that one who engaged in the "business" of regularly publishing a "malicious, scandalous and defamatory newspaper, magazine or other periodical" was guilty of a nuisance, and suits in the name of the state were authorized to abate the nuisance and enjoin the publishers from future violations. Truth was to be an absolute defense provided it was published with "good motives and justifiable ends." 283 U.S. 697, 702.

[5]*Ibid.*, 721.

with safeguards of careful procedure. More than that, he urged the necessity of tolerating some abuse for the sake of the essential freedom, and found that the Minnesota procedure offered no immunity on proof of truth and assured effective and continuing suppression of the publication under threat of contempt.

The dissent by Justice Butler, in which Justices Van Devanter, Sutherland, and McReynolds concurred, seemed oblivious of the unconstitutional nature of prior restraint and assumed that a state court operating by summary procedure was freed of the obligations of due process of law.[6] Moreover, the dissenting justices would have left the states free of the compulsions of the First Amendment, as if the amendment had been intended less to assure a minimum standard of freedom to the people than to provide an exclusive operations franchise for state legislatures bent on some degree of suppression of freedom.

ABUSES UNDER THE POSTAL POWER

One federal field in which the cleansing force of the *Near v. Minnesota* philosophy was needed, and had been long overdue, was in the application of police phases of the postal power to publications entered in the mails. Only after the federal government had required the states to overhaul their licensing of literature distribution, their picketing laws, and prevailing practices in the field of constructive contempt under the First and Fourteenth amendments, did the courts get around to cleaning up this perversion of the federal power.

The postmaster general, in the course of nearly seventy years of encouragement from the courts and Congress, had created an administrative tradition of great power, which could easily decide the financial fate of any publication making heavy use of the mails. In 1946, in a case started by Postmaster General Walker and finished in the name of his successor, the postal censor was boxed soundly about the eyes and relieved of moral responsibility for the content of publications entered at second-class rates.[7]

The long trail by which the postal power became censorial started in 1877 with the decision in *Ex parte Jackson*.[8] Here Justice Field, writing for the court, laid down the basic assumption that if Congress had a right to designate what was to be carried in the mails, it had the corollary right to decide what to leave out. Justice Field recognized, however, the duty of exercising these powers so as not

[6] *Ibid.*, 723.
[7] *Hannegan* v. *Esquire*, 327 U.S. 146 (1946).
[8] 96 U.S. 727 (1877).

to conflict with the First Amendment. "Liberty of circulating," he said, "is as essential to that freedom as liberty of publishing." His idea of safeguard was: "If, therefore, printed matter be excluded from the mails its transportation in any other way can not be forbidden by Congress."[9]

The opinion recalled the remark of Senator Calhoun, during a debate on the floor over the postal power, that the power to make moral judgments over mailable matter would "subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure." It would, in fact, said Calhoun, in some respects more effectively control the freedom of the press than any sedition law, however severe its penalties.[10] With the safeguard noted, the court approved the interference with freedom of the press on the excuse of protecting the public morals. But Calhoun proved to be more nearly right in predicting the development of the power than did Justice Field.

Jackson was tried under the penal section of the statute applying to lottery tickets, and the decision had the effect of upholding the sentence. In the next case of importance, which also concerned lottery tickets, the Supreme Court allowed Congress to ban newspapers from the mails if they carried lottery advertisements. The penalty sanctions applied to Jackson were forgotten; here the result was an abridgment of freedom of the press on the theory that it was less important than suppression of lottery advertising.[11] The court explained:

> The circulation of newspapers is not prohibited, but the government declines itself to become an agent in the circulation of printed matter which it regards as injurious to the people. The freedom of communication is not abridged within the intent and meaning of the constitutional provision.[12]

Deutsch asserts that this case started a series of "slight deviations" from the meaning of the First Amendment which finally led to administrative exclusion from the mails. *Hannegan* v. *Esquire* was an extreme in the same trend, and in it the postmaster general was called upon to prove his claim that he had a right to decide, on the

[9]*Ibid.*, 733.

[10]Eberhard P. Deutsch puts the Calhoun remark into its historical setting, the effort to control antislavery literature by requiring the United States to enforce state laws regulating the mails. This is an article excellently summarizing the decisions under the postal power and calling for just exactly what the Supreme Court gave the country eight years after it was written. "Freedom of the Press and of the Mails," *Michigan Law Review*, Vol. 36, No. 5 (March 1938), p. 703.

[11]*In re Rapier*, 143 U.S. 110 (1892).

[12]*Ibid.*, 134.

basis of his evaluation of the contents of a publication, whether or not it was entitled to second-class mailing privileges. Leading cases in the interval between *In re Rapier* and the *Esquire* case were *Lewis Publishing Co.* v. *Morgan, Masses Publishing Co.* v. *Patten,* and *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson.*[13]

The *Lewis* case tested the act of August 24, 1912, which required disclosure of the ownership of publications having second-class privileges, the average circulation of daily papers, the names of the responsible staff members, and a detailed report on owners and security holders of all kinds. In addition, the act required all paid matter to be so marked, plainly. As was to be expected, this act was heavily attacked as infringing freedom of the press to do its business in secret and to carry on widespread alliances with powerful business interests without public knowledge.

Continuing the slight deviations mentioned by Deutsch, this act set up needless sanctions which deprived guilty parties of the use of second-class mailing privileges. The criminal penalties, if properly applied, would certainly have given the public ample protection while leaving the newspaper an opportunity to face a court properly qualified to decide its constitutional rights. But instead of the courts, the postmasters of America were deputized as gumshoe informers in an administrative hierarchy headed by the postmaster general and his staff. Only prosecution for failure to mark advertising as such depended upon criminal sanctions alone.[14]

The government, with the permission of the court, fastened on the second-class mail permit the distinction and designation of "high privilege," and concluded that the publishers had no right to the low rates, but merely the privilege of enjoying them after meeting the conditions.[15] It was an excuse for suppressing and infringing the freedom of the press, but, to make the excuse seem plausible, Blackstone's narrow and reactionary view of press freedom was always brought in, as if that explained and justified the infringement. Restraint was not entitled to its right name unless the editor had to take his copy beforehand to a government censor. Moreover, the power to divide all mail into four classes, one of which was reserved for periodicals at a special low rate one-eightieth of the

[13]229 U.S. 288 (1913); 244 F. 535 (1917); 41 Sup. Ct. 352; 255 U.S. 407 (1921).

[14]The efficacy of the legislative device here used is not doubted, and in other circumstances the simple and effective penalty might be desirable. But this is a constitutional issue, and the path to breaching the great fundamental rights of American citizens should not be smoothed for the bearers of arbitrary power; instead, it should be made as difficult as the clear and present danger test will allow.

[15]229 U.S. 288, 299–300, 310 (1913).

first-class rate, carried the power to exclude as well as to include, the court reasoned. Whether the second-class permit was high privilege or not, this was the power of life or death to many publications.

The *Masses* case indicates the objectionable nature of the arbitrary exercise of the postmaster's power.[16] In this circumstance it was strengthened when the powers of the Espionage Act of 1917 were read into it, but the procedure was that of entrusting the case to the court only after the administrative board had prepared a virtually conclusive finding of fact. The postmaster would not even specify the charges against the publication in detail until his decision had been ordered up for review by the court.

The Espionage Act gave the postmaster general the power to exclude matter which in his judgment interfered with the prosecution of the war, and a wide sweep of power resulted. The suppression of circulation ranged from publications which urged that more money be raised by taxes and less by loans, through Thorstein Veblen's *Imperial Germany and the Industrial Revolution,* on to frankly pro-German material.[17]

The widest use of the postmaster general's power under the Espionage Act was in the case of *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson.*[18] Although the administrative order was upheld, the minority opinions by Justice Brandeis and Justice Holmes have become more nearly the law of the land since the *Esquire* case.

Justice Clarke, writing for the court, based the decision in the Milwaukee case on the traditional concepts gradually expanded since 1877—the high privilege nature of the second-class rate, the overriding of the First Amendment by the virtually absolute postal power, and the finality of the postmaster general's findings. The Espionage Act, the court held, further extended the traditional concepts by declaring publications violative of the act to be unmailable. Also, it put the burden of law enforcement on the postmaster general.

Moreover, the denial of second-class entry to one edition of a publication amounted to revoking the second-class privilege, although reinstatement could be ordered at the postmaster general's pleasure.[19] Thus, although the statute referred to "non-mailable" newspapers, the court allowed the postoffice to penalize them by reclassi-

[16]*Masses Publishing Co.* v. *Patten,* 244 F. 535 (1917).

[17]Chafee, *Free Speech in the United States,* pp. 98–99. See also his discussion of the *Milwaukee Social Democratic Publishing Co.* case, pp. 298–305.

[18]41 Sup. Ct. 352 (1921).

[19]*Ibid.,* 353–55.

fication for rate purposes, though not actually barring them from the mails.

Justice Brandeis centered his dissent on this procedure. He could not find congressional authorization for denial of second-class rates in the Espionage Act or in any provision of the postal laws themselves as amended by the act, though outright denial of use of the mail was authorized by the statutes. Admitting the power of the postmaster general to remove matter from the mail or to reject material regarded as unmailable, the dissent denied that the power extended to excluding for the future matter not as yet offered for transportation. This part of the argument had as much relation to issuance of postal fraud orders as to mailing of periodicals.

Justice Brandeis asserted that previous postmasters and attorneys general had denied the power of exclusion for the future. The Postal Laws and Regulations, he continued, gave no jurisdiction over content to the postmaster, who had gained his censorship power by a subterfuge. He added:

> The requirement that the newspaper be "regularly issued" refers, not to the propriety of the reading matter, but to the fact that publication periodically at stated intervals must be intended and that the intention must be carried out. Similarly, the requirement that the paper be "published for the dissemination of information of a public character" refers not to the reliability of the information or the soundness of the opinions expressed therein, but to the general character of the publication. The Classification Act does not purport to deal with the effect of, or the punishment for, crimes committed through a publication.[20]

The second-class rate seemed to Justice Brandeis more clearly a right than a privilege, in view of the payment of postal deficits from tax funds, and he could not see any pretext for awarding the postmaster general discretion to extend or to withhold it. Moreover, it was clear to the dissenting justices that the Bill of Rights limited the postal power, but here were prior censorship and arbitrary administration both in positions of superiority to a constitutional right. As witness, a newspaper which had offended the postmaster general was being fined $150 a day, without effective hearing in court, through demotion to another class at a higher rate.

> The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history. Every fine imposed by a court is definite in amount. . . . But here a fine imposed for a past offense is made to grow indefinitely each day—perhaps throughout the life of the publication [about $180,000 since the order was issued].[21]

[20] *Ibid.*, 358–59. [21] *Ibid.*, 362.

Esquire Magazine

The reasoning of the Post Office Department in the *Esquire* case proceeded logically from the court's treatment of the Milwaukee *Leader*. It was an easy step from penalizing publications deemed bad for the country to levying postal rate fines against those considered not good enough for the country. That was to be *Esquire*'s fate, and the fine, in the form of a rate increase, was estimated at about five hundred thousand dollars a year. The transition was accomplished by re-interpreting the statutes which set up the conditions under which publications were to be entered as second-class matter. The fourth condition in the statute was:

> It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.[22]

The *Esquire* permit was revoked because the postmaster general, according to the court, felt that smoking-room humor was a "dominant and systematic feature" and that any such magazine was not making the "special contribution to the public welfare which Congress intended by the Fourth condition."

Justice Douglas wrote the majority opinion for the court in this case. He found that the controversy between the magazine and the postmaster general concerned the question of whether the contents were good or bad. It was not doubted either that the magazine disseminated information of a public character or that it was devoted to literature or the arts. The postmaster general, the justice said, was asking the court for approval of the power of censorship. Should it be granted? Was this what Congress intended?

The court defined the second-class rate as a subsidy instead of a high privilege, and interpreted the statutes setting forth the postmaster general's classification powers as applying to the "format of the publication, and the nature of its contents, but not to their quality, worth, or value." In that view, the court explained, literature or the arts meant no more than productions which conveyed ideas by words, pictures, or drawings. Plainly, Congress made no radical or basic change in the type of regulation which it had adopted for second-class mail in 1879.[23]

[22] *Hannegan* v. *Esquire*, 327 U.S. 146, 148 (1946).
[23] *Ibid.*, 152.

Justice Douglas bolstered the court's interpretation of the statute by referring to Congress' intentions, as indicated in comment attending the amendment of the postal laws, and to the Postal Commission report of 1906, wherein it was explained that the second-class mail qualifications were defined by purposes, not by qualities. He recalled, with approval, Senator Calhoun's vision of the censorship possibilities inherent in congressional discrimination between papers offered for transmission in the mails. Finally:

> But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates . . . [or] the further power to determine whether the contents meet some standard of the public good or welfare.[24]

As Justice Thurman Arnold of the court of appeals wrote, in deciding against the Post Office Department at that level:

> We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that "neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."[25]

New Status of the Postal Power

According to the courts and Congress, laws governing the transportation of printed matter were plainly subject to the First Amendment, but careful respect for freedom of the press was breached when the courts allowed postmasters to bar newspapers carrying lottery advertising, instead of relying simply on criminal law penalties to control the undesirable traffic in tickets and advertising. It is important that the safeguards of freedom be entrusted to the courts, for they alone of all the agencies of government are equipped to make constitutional decisions.

Under color of the Espionage Act of 1917, and through the tolerance of the courts, the postal administrators not only barred some publications from the mail, but also, by denying a classification which would permit second-class mail rates, placed new burdens on some

[24] *Ibid.*, 158–59.
[25] *Esquire, Inc.* v. *Walker*, 151 F. 2d 49, 55 (1945).

papers.[26] The dissents of Justice Brandeis and Justice Holmes were prophetic, and in a sweeping review of the whole postal power, in the *Esquire* case, the Supreme Court returned the classification power to general considerations of format and nature of content, rather than allowing it to go on into outright censorship. The liberty of circulating is every bit as important as freedom from prior censorship, and the court recognized that fact in limiting the administrative use of the postal power.

In addition to the reform worked by the decision against the Post Office Department in the *Esquire* case, there is a need for statutory direction to both postmaster and federal district attorney, relieving the former and charging the latter with police duty in connection with the mails. Moreover, the administrative postal censorship should be required to state, in writing, its reason for removing printed matter from the mails. Local postmasters should be relieved of the power to hold up newspapers presented for mailing because they contain lottery advertising. There is a world of difference between inadvertent mention of a guessing game in newspaper advertising and a lottery evil which has a whole state or nation at its mercy. Yet editions of newspapers have been held up in post offices for such minor offenses. Administrative warnings and criminal penalties will keep the papers as careful as ever, and officialdom neither high nor low should be encouraged to treat lightly the periodicals protected by the First Amendment.

ABUSE OF THE LICENSING POWER

The minorities suffering most interference with their organizing activities in the 1931–47 period were labor union members and Jehovah's Witnesses. While labor, assisted by a powerful arm of government, checked and confounded its antagonists, the Jehovah's Witnesses met the traditional fate of an intense and rugged evangelical sect: persecution. In six months of 1940, alone, the American Civil Liberties Union asserted in a communication to the Department of Justice,

> 1488 men, women and children were victims of mob violence in 335 com-

[26]Suppressions and reclassifications in World War II included *Social Justice*, the organ of Father Charles E. Coughlin, which suspended voluntarily after a complaint was filed with the department; the *Militant*, Trotskyist organ, whose permit was revoked on March 3, 1943, and restored five days later; three pro-fascist magazines and a pacifist weekly, the latter regaining its permit two years later; several issues of the *Fighting Worker* and the *International News*, organs of the Revolutionary Workers League which were banned from the mail, never having had second-class rates; one issue of the *Townsend National Weekly* which was barred, as were several individual issues of extremist periodicals. *Yale Law Journal*, Vol. 53, No. 4 (September 1944), p. 733.

munities in 44 states. . . . Nothing parallel to this extensive mob violence has taken place in the United States since the days of the Ku Klux Klan in the 1920's. No religious organization has suffered such persecution since the days of the Mormons.[27]

The Witnesses demanded the protection of the federal courts under the First and the Fourteenth amendments, and the resulting decisions are among the notable ones in the history of freedom of speech and press in the United States.

Several aspects of their religious belief and practice have caused the Witnesses to meet opposition. They are conscientiously opposed to bearing arms; they do not wish to salute a national flag because such an act is in conflict with their conception of worship; they have described organized religion as a "snare and a racket" and have been particularly vigorous in criticism of the Roman Catholic church. As evangelists, they are colporteurs who spread their message in private homes as well as on the streets, and their persistence is the kind born of a millenial philosophy willing to endure the present for the sake of the great day that is coming. Herbert Hewitt Stroup, who went among them to study their ways and to write about them, had this to say of their sincerity:

When I first began to study the Jehovah's Witnesses, I was fortunate enough to secure the fine help of one of the counsels of the American Civil Liberties Union. In introducing me to the investigation, he said, in effect: Probably you have never seen anyone who is willing actually to die for his religious convictions. With our sophisticated ways of doing things, and with our mentalities, we moderns think that there is nothing for which a man should give his life. But when you meet the Witnesses, you will be meeting, probably for the first time, people who are willing to be persecuted, even slain, for the sake of their religious faith. At the time I was not entirely convinced. Now I am. I am confident that the Witnesses demonstrate one of the most sacrificial ways of living which has been seen in many decades. So profound is the sincerity of faith of the Witnesses that even the impartial observer Mr. Czatt says: "There are some beautiful Christian characters among them." They are willing to give up friends and family, to work indefatigably in their spare hours, to give unstintingly of their money, to withstand bitter persecution, and even, in certain European countries, to remain loyal to their convictions unto death—all for "the cause."[28]

[27] *Liberty's National Emergency* (New York: American Civil Liberties Union, 1941), p. 27.

[28] Herbert Hewitt Stroup, *The Jehovah's Witnesses* (New York: Columbia University Press, 1945), p. 63. The Witnesses tell their own story quite simply in three or four of the large number of publications issued by their organization, the Watchtower Bible and Tract Society, Inc., Brooklyn. *Theocracy*, a sixty-three-page pamphlet by J. F. Rutherford, late leader of the Witnesses, states the belief and its sources, and recounts some of the details of world-wide persecution. *Fighting for Liberty on the Home Front* takes the sequence of trouble into World War II.

Stroup described the Witnesses as one of the "four predominant religious expressions which are typically American in their origin and development,"[29] along with Christian Science, the Church of Jesus Christ of the Latter Day Saints (Mormons), and the religious philosophy and practice of the American Negro. He declined to guess at a membership figure for the Witnesses, saying that the facts, if known, were too closely kept for anyone outside the inner group to have any real knowledge of the extent of the movement. Mulder and Comisky, however, after an examination less intensive than Stroup's, put the membership at 45,000 Witnesses in the United States in 1939, and said there were an additional 200,000 followers. They also stated that in the same year the Witnesses circulated 309,000,000 copies of their literature, and through the printing press, radio, and portable phonograph reached 19,000,000 persons.[30] Stroup said that in 1940, "throughout the world there were 106,000 Publishers [part-time workers], 64,995 of them in the United States; the corresponding figures for the Pioneers [full-time workers] were 7624 and 4204."

Milton Stacey Czatt, who examined the Witnesses more particularly to analyze their theology, said that the teaching, combined with persecution, created an almost

pathological desire for martyrism. However, this masochistic tendency which would derive pleasure from pain has high survival value. It inflates the ego, gives power in conflict and convinces the sufferer that he bears the mark of membership in the true church. Whether the persecution be imaginary or real, it gives solidarity to the organization, stabilizes it psychologically, and provides an impetus for every attempted conquest. While they parade as martyrs, some hearts will ever feel kindly toward them.[31]

Judge Rutherford Uncovers Fifth Column is a pamphlet well known for its attack on the Roman Catholic church. *Jehovah's Witnesses in the Crucible*, contained within the pamphlet, *Be Glad, Ye Nations*, says of the trials endured by the Witnesses: ". . . They were assaulted, beaten, kidnapped, driven out of towns, counties and states, tarred and feathered, forced to drink castor oil, tied together and chased like dumb beasts through the streets, castrated and maimed, taunted and insulted by demonized crowds, jailed by the hundreds without charge and held incommunicado and denied the privilege of conferring with relatives, friends or lawyers. Other hundreds were jailed and held in 'protective custody.' Some were shot in the nighttime, some threatened with hanging and beaten into unconsciousness. Amid the mob violence many had clothes torn off; their Bibles and Bible literature were seized and burned publicly; their automobiles, trailers, homes and assembly places wrecked and fired, resulting in damages totaling very many thousands of dollars . . . In numerous instances the lawyers as well as those testifying in defense of the Witnesses were mobbed and beaten while attending court. Mobocracy swept through forty-four of the forty-eight states of the Union, and in 1940 alone 600 mobs were reported and more than 3000 Witnesses were arrested." Pp. 53–54.

[29]Stroup, *The Jehovah's Witnesses*, pp. 1–2.

[30]John E. Mulder and Marvin Comisky, "Jehovah's Witnesses Mold Constitutional Law," *Bill of Rights Review*, Vol. 2, No. 4 (Summer 1942), pp. 262, 265.

[31]Milton Stacey Czatt, *The International Bible Students Jehovah's Witnesses* (New Haven: Yale University Press, 1933), pp. 40–41.

The legal staff at this time was headed by Hayden C. Covington, a vice-president of the society. Stroup said of him and his work:

> Mr. Covington, as head of the department, traveled incessantly to near and distant parts of the country for the trials involving Witnesses. In a courtroom, during a case, I have heard Witnesses say of Covington that he was "smart," that he certainly was a devout Witness (which to them made considerable difference in the quality of a man), and that he was a hard worker.[32]

The Landmark Case: *Lovell* v. *Griffin*

This background helps to make clear the remarkable series of cases in which the Witnesses have been involved. The landmark case in the series, though there were others almost equally important, was *Lovell* v. *Griffin*.[33] This case held invalid a sweeping municipal ordinance which forbade the distribution of literature of any kind without first obtaining the written permission of the city manager.

When this case came up to the Supreme Court the Witnesses had been struggling with the courts for years, seeking protection under the constitutional guarantees of freedom of religion, speech, and press. A case like *Maplewood Township* v. *Albright* in the common pleas court of Essex County, New Jersey, is an example of the treatment their pleas had received. Here the court not only approved a licensing ordinance, but held that the word "religion" in the Constitution could not be applied to a sect like the Witnesses. Said the court:

> The term "religion" has reference to one's views of his relations to his creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter.[34]

The cynicism of the New Jersey court found no counterpart in the Supreme Court when the *Lovell* v. *Griffin* case came on for review. Alma Lovell, a Jehovah's Witness, had been sentenced to fifty days in jail in lieu of a fifty-dollar fine which she had declined to pay. The ordinance under which she was charged forbade the "practice of distributing . . . circulars, handbooks, advertising, or literature of any kind . . . without first obtaining written permission from the city manager of the city of Griffin."[35] The Witness admitted distributing

[32] Stroup, *The Jehovah's Witnesses*, p. 25.

[33] 303 U.S. 444 (1938).

[34] *Maplewood Township* v. *Albright*, 176 A. 194, 195 (1934), quoting *Davis* v. *Beason*, 133 U.S. 333, 342 (1890).

[35] *Lovell* v. *City of Griffin*, 303 U.S. 444, 447 (1938).

religious tracts without first obtaining permission and asked dismissal of the complaint as abridging freedom of the press and prohibiting the free exercise of her religion.

The court observed the extraordinary sweep of the ordinance, taking in all literature and banning all types of distribution. The public welfare and public order were nowhere made the standards of evaluation. The court put it flatly: "The ordinance prohibits the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager."[36] The ordinance was held invalid on its face, being so broad that it cut away the "very foundation of the freedom of the press by subjecting it to license and censorship." Men had struggled against this type of restraint for long in England and America; this was not the time or the place to revive it.

Chief Justice Hughes, whose firm and candid discernment of censorship in the *Near* case had turned the tide for freedom, wrote this opinion too. Whereas in *Near* he had seemed content to establish freedom of the press as meaning little, if anything, but freedom from prior restraint, he here regarded immunity of this sort as not exhausting the guarantee. The Griffin ordinance established a plan of censorship and license of the "baldest form," the chief justice said, adding:

> The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets. These indeed have been historic weapons in the defense of liberty, as the pamphlets of Thomas Paine and others in our own history abundantly attest. The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.[37]

Using the language of the *Grosjean* v. *American Press Co.* case of two years earlier, the opinion asserted that liberty of circulation "is as essential" as liberty of publishing. Since the Georgia ordinance was void on its face, there was no reason to seek a permit under it.

This was the decision which opened up new avenues of protection —avenues old to the Constitution but newly available to the Witnesses—in courts throughout the land. Many groups, especially the expanding labor movements, were to benefit from the spread of liberty horizontally among the people.

Local Government Compliance Required

The Griffin, Georgia, ordinance was very general in its terms, and

[36] *Ibid.* 451.
[37] *Ibid.*, 452.

the Supreme Court opinion naturally called to the attention of municipal councils everywhere the need for regulatory measures which would give desirable public protection while still leaving ample room for the constitutional guarantees. State and federal appellate courts helped in the search by considering a variety of ordinances in the light of the Lovell opinion.[38] Nineteen months after the Lovell decision, the United States Supreme Court decided *Schneider* v. *State,* in which, through the device of covering ordinances of several cities in the one opinion, it made considerable progress in defining permissible restraints.[39] The ordinances construed were those of Irvington, New Jersey, Los Angeles, Milwaukee, and Worcester, Massachusetts.

It was argued that the Los Angeles ordinance was distinguished from the Griffin device by its relatively narrow prohibition on street distribution, leaving open other possibilities. The handbill distributed concerned a meeting of Friends of the Lincoln Brigade, a group supporting one of the volunteer units fighting for the government in the Spanish Civil War and, therefore, a matter of public interest. The police power justification advanced in favor of the ban was that the ordinance prevented littering of the streets. The Supreme Court suggested that street littering could be punished without banning distribution.[40]

The offender under the Milwaukee ordinance was a union picket proclaiming a labor dispute with handbills which referred to a nearby meat market. Again, street littering was cited as justification for the prohibition. The Worcester case was similar, and the state court justified the restraint of freedom of press by saying that the ordinance

> interferes in no way with the publication of anything in the city of Worcester, except only that it excludes the public streets and ways from the places available for free distribution. It leaves open for such distribution all other places in the city, public and private.[41]

The Irvington regulation was broader, restricting street distribution or house-to-house calls to those persons who had the written permission of the chief of police. In issuing the permit the police department gathered a great deal of personal information about the canvassers, ostensibly to protect the public against criminals. The police were to reject applicants deemed not of good character; hours ap-

[38]An example is *Borough of Edgewater* v. *Cox,* 8 A. 2d 375 (1939), where the central feature of the permit system placed discretion in the hands of the chief of police. The New Jersey court found the arbitrary power of the police based on vague and indefinite standards and therefore unconstitutional.

[39]308 U.S. 147 (1939).

[40]*Ibid.,* 154.

[41]*Ibid.,* 157.

proved for canvassing were from 9 A.M. to 5 P.M., and a distributor was required to carry the formal permit, to which a personal photograph was attached, and to exhibit it upon request to policemen.[42]

The accused person in the Irvington case was a Jehovah's Witness. She had gone about her work without a permit, being conscientiously opposed to the required procedure. At her trial she pleaded that the measure unreasonably restricted freedom of speech and press. The New Jersey court of errors and appeals thought the Irvington ordinance free of the objectionable features of the Griffin regulation, and held it consistent with maintenance of public order.

The Supreme Court of the United States found each ordinance in conflict with the Constitution. It asserted that fraudulent solicitation could be prevented without passing an unconstitutional ordinance. However, to distributors the court said: Distributors may not go too far, take over streets, force things on people.[43] Then, abandoning the long-standing presumption of the validity of state statutes, the court said:

> This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used . . .
>
> In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.[44]

The court then held that the good appearance of the streets is not important enough "to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." Those who throw paper on the streets could be punished, if need be, but lawful distribution was something else again.

Even when the ordinances restricted only the use of streets and alleys they were not constitutional: "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[45]

[42] *Ibid.*
[43] *Ibid.*, 160.
[44] *Ibid.*, 161.
[45] *Ibid.*, 163.

The Irvington ordinance, moreover, created a police censor, in the disguise of a system to screen out fraudulent solicitation, and this grave fault could not be tolerated. However, the court distinguished commercial literature and solicitation from that given constitutional protection here, and assured the country's municipalities that, in any case, reasonable regulation of hours of solicitation was proper.[46]

A Definition of "Religion"

The ordeal of Newton Cantwell and two sons, Jesse and Russell, in New Haven, Connecticut, brought them into conflict with a state law which commissioned the secretary of the public welfare council as the municipal expert on religion, charity, and philanthropy and required application to him for licenses to collect money in such activities. The secretary was directed to "determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity . . ."[47] Probably this statute seemed reasonable to the officials who drafted it and the legislature which passed it, but it was censorship and the court branded it as such.

The New Jersey court, in considering the *Cantwell* case on appeal, had interjected an additional issue into the considerations by deciding that the Cantwells were not protected by the Fourteenth Amendment because they were soliciting funds. This point, along with fees prescribed by some statutes and ordinances, was to divide the court sharply. The disagreement has so many ramifications in constitutional protection of the press that it has been separately treated (see pp. 149–54).

On the censorship point the New Jersey authorities argued that since the statute provided for the judicial review of any complaints against the licensing system, it was valid. The court said:

> A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.[48]

Jesse Cantwell had been convicted of the common-law offense of

[46] *Ibid.*, 164–65. The New York court of special sessions, in *People* v. *Finkelstein*, 9 N. Y. S. 2d 941 (1939), made the same distinction of commercial and public-interest activities, simply declining to apply an ordinance enacted to regulate commercial hawkers to the seller of a pamphlet on the life of John L. Lewis. The Lewis pamphlet, the court said, was not merchandise. See also the license requirement in *City of Dearborn* v. *Ansell*, 287 N.W. 551 (1939), where the city clerk could censor the material to be distributed by refusing a permit if he found it "untruthful."

[47] *Cantwell* v. *Connecticut*, 310 U.S. 296, 302 (1940).

[48] *Ibid.*, 306.

inciting a breach of the peace. His phonograph records, played on the street for two persons whom he had asked to listen, proved offensive to his hearers. The conviction here was set aside, but the court said that a statute narrowly drawn to cover the point of inciting breach of the peace would have presented a different question. The evidence showed that Jesse Cantwell was orderly and went his way quietly when his audience objected to the tone of the appeal. Provocative language, the court said, is profane, indecent, or abusive and directed to the person of the hearers. Such epithets would not be protected by the Constitution.[49] Justice Roberts, writing for the court, said:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times resorts to exaggeration, to vilification of men who have been or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.
>
> The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed . . . The petitioner's communication, considered in the light of the constitutional guarantees, raised no such clear and present menace to public peace and order as to render him liable to conviction of the common law offense in question.[50]

Later Developments

A newspaper subscription solicitor was required to buy a license as a peddler in *People* v. *Passafume*.[51] The restraint was carefully conditioned by easy appeal to the town board and court review, but the solicitor was held to be engaged in a business pursuit not entitled to constitutional exception. The court drew a line between the individual and his business, letting the First and Fourteenth amendments protect the one but not the other. The court said that the ordinance in question, that of New Castle, New York, did not interfere with the free distribution of anything, but only with sales for future delivery. Newspapers were not specifically listed in the ordinance and were included by construction. The court explained:

> When the speaker charges admission to the lecture hall, or the writer

[49] *Ibid.*, 309. [50] *Ibid.*, 310–11.
[51] 22 N. Y. S. 2d 785 (1940).

offers his works for sale, he engages in commerce like any other merchant and becomes subject to reasonable, necessary legislation.[52]

The New York court ruled with a great deal more self-confidence than the United States Supreme Court when it considered the same constitutional problem.[53] Regardless of the weaknesses of any legal position which distinguishes between freedom of religion and freedom of the press, however, it appears to be the law.

An ordinance intended primarily to apply to newsboys and bootblacks was successfully extended to Jehovah's Witnesses in *City of Manchester* v. *Leiby*.[54] The persons covered were required to obtain a badge from the superintendent of schools and make a refundable deposit of fifty cents. The superintendent had no discretion, and revocation procedure centered in the mayor and aldermen. Small fines were provided for infractions. In effect, it was merely a registration ordinance which compelled the use of a standard badge of identification.

An ordinance approved by the courts which appears to have a degree of restriction on freedom of press was designed to help check a series of prowlings and burglaries of wealthy homes, of which there were many, in Southampton, Suffolk County, New York. All vending, peddling, solicitation, and distribution were forbidden except to homes where the prior consent of the occupant had been obtained. Persons who had lived in Southampton for six months and were bona fide residents were exempt from the ordinance.

The court of appeals said that the ordinance regulated pamphleteering in private places, not public, and that no licensing factor was involved.[55] The Constitution did not grant the privilege of going freely on private property for solicitations and the ordinance did not interfere with the practice of religion, the court said. The discrimination between resident and nonresident was justified on the basis of the size of the village, since the police were acquainted with residents and the operations of the ordinance would give them an opportunity to detect the presence of undesirable persons. An ordinance similarly restricting residents and nonresidents alike was held invalid in *Zimmerman* v. *Village of London, Ohio*.[56] This was one of the

[52] *Ibid.*, 788.

[53] See *Jones* v. *Opelika*, 319 U.S. 103 (1943), and the dissents in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943), discussed on pages 150–54.

[54] 117 F. 2d 661 (1941). Certiorari denied, 313 U.S. 562.

[55] *People* v. *Brown; People* v. *Bohnke*, 38 N.E. 2d 478 (1941). The opinion below is at 27 N. Y. S. 2d 241 (1941), and denial of certiorari is found at 316 U.S. 667 (1942) and 316 U.S. 713 (1942).

[56] 38 F. Supp. 582 (1941).

Green River ordinances which have been upheld as applied solely to commercial canvassers.[57] The urgency of dealing with a local crime wave was not present.

In *Ex parte Walrod* the ordinance had placed the whole business area out of bounds to solicitors, and was void.[58] In Moscow, Idaho, an ordinance tailored expressly for the Witnesses authorized a license only for those willing to salute the flag and recite the pledge of allegiance, acts which the Witnesses held to be blasphemous. The ordinance was overturned both as prior restraint and as censorship.[59] Another *Green River* ordinance fell in *Donley* v. *City of Colorado Springs* because restrictions properly applied to commercial matter could not be used to abridge freedom of press and religion.[60] A Jehovah's Witness was held not to be a peddler in the usual sense.

Cases like *Donley* in reality attacked the faith of the Witnesses in holding them subject to commercial regulation. So did the ordinance in *Borchert* v. *City of Ranger,* and the court remarked that evidently it was expected to make the "merits or fallacies" of the religion matters material to the decision. The commercial application of this ordinance was allowed to stand, but no wider application was permitted.[61]

The supreme court of Colorado upheld an ordinance which banned the use of a loudspeaker mounted on an automobile. The car was parked and the loudspeaker used in a business area. The court said that no interference with religion resulted from the ban, and that the people had a right to protect themselves "from concentrated and continuous cacophony."[62]

Also distinguished and given limited constitutional protection were parades or processions, for regulations applying to demonstrations of this nature were reasonable and necessary when applied to prevent

[57]65 F. 2d 112 (1933).

[58]120 P. 2d 783 (1941).

[59]*Kennedy* v. *City of Moscow,* 39 F. Supp. 26 (1941).

[60]40 F. Supp. 15 (1941).

[61]42 F. Supp. 577 (1941). Included were ordinances of Ranger, Dublin, Commanche, and Coleman, Texas. The last three had been passed especially to stop Jehovah's Witnesses and lodged wide discretion in some city official. All were void as applied to the Witnesses. Similar ordinances were invalidated in *Emch* v. *City of Guymon,* 127 P. 2d 855 (1942); *People* v. *Gage,* 38 N. Y. S. 2d 817 (1942); *Greiner* v. *City of Yale,* 139 P. 2d 606 (1943); *Largent* v. *Texas,* 318 U.S. 418 (1943), a case which had to go to the Supreme Court of the United States direct from a county court in Texas because appeal from a county court fine of only one hundred dollars was not permitted by Texas rules; *Brown* v. *City of Stillwater,* 149 P. 2d 509 (1944), where the solemnity of the legal reports is broken by the statement of the complaining witness that the signs "Watchtower" and "Consolation" on the canvas bags of the Jehovah's Witnesses were insulting within the meaning of the ordinance and tended to incite him to a breach of the peace; *Ex parte Walrod,* 149 P. 2d 513 (1944); *Herder* v. *Shahadi,* 14 A. 2d 475 (1940); *Estey* v. *Coleman,* 21 N. Y. S. 2d 829 (1940); *Jamison* v. *Texas,* 318 U.S. 413 (1943); *Hord* v. *Fort Myers,* 13 So. 2d 809 (1943); *Reid* v. *Borough of Brookville,* 39 F. Supp. 30 (1941).

[62]*Hamilton* v. *City of Montrose,* 124 P. 2d 757, 762 (1942).

taking over a street against the public interest. In *Cox* v. *New Hampshire* five Jehovah's Witnesses, among sixty-three who paraded without obtaining a license as required by state statute, were convicted.[63] In sustaining the application of the statute and its fee, which ranged from a nominal amount to three hundred dollars and was applied in the discretion of city officials, the United States Supreme Court said that the statute was intended not to deny use of the streets, but to regulate their use in the interest of the safety and convenience of the people.

> One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions.[64]

Proper policing could not be arranged without advance notice, and the fixing of time and place was reasonable.

After considerations of public convenience and safety were cared for, the Witnesses were entitled to a license for a parade. The statute was construed by the state court as requiring a "reasonable fixing of the amount of the fee," and objections raised on that score were denied. A flat fee prescription would not make allowance for parades as various in size and type as the city had to deal with.

> We perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than to impair the liberty sought.[65]

A demonstration near a foreign embassy in Washington may be suppressed by statute, as construed in *Frend* v. *United States*.[66] Unfriendly demonstrations may be dispersed by police, under the authority of a joint resolution by Congress, and refusal to obey the police is unlawful. This procedure was said to be necessary because of the obligation under international law of securing the safety of representatives of a foreign government.

Sidewalk photographers may be denied use of the streets because their work is commercial instead of being in the public interest.[67]

HOUSE-TO-HOUSE EVANGELISM

When the city of Struthers, Ohio, attempted to keep Jehovah's Wit-

[63] 312 U.S. 569 (1941).
[64] *Ibid.*, 574.
[65] *Ibid.*, 577.
[66] 100 F. 2d 691 (1938).
[67] *Portnoy* v. *Hohmann*, 122 P. 2d 533 (1942); *Pittsford* v. *City of Los Angeles*, 122 P. 2d 535 (1942).

nesses and others who called from house to house from summoning persons to the door, a sharp division was precipitated in the Supreme Court of the United States.[68] Those who attacked the Witnesses on grounds of patriotism and Americanism were aroused because they were being extended constitutional protection on a broad scale, and, more seriously, it seemed that the traditional concept of a man's home as his castle was being disturbed.

The opinion of the court dealt patiently with those fears. Justice Black explained that general trespass-after-warning laws were adequate to accomplish the avowed purposes of the Struthers ordinance. He mentioned with approval a model ordinance suggested by the National Institute of Municipal Law Officers which would

> make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. . . . This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a house where it belongs—with the homeowner himself.[69]

Struthers could not, by ordinance, make the decision on behalf of all its citizens, and the attempt to so legislate was in conflict with freedom of speech and press. Without notice to them to stay away, Struthers could not make criminals of those innocently bent on the carrying of information.

Justice Murphy separately concurred, appealing as much to the good judgment of his fellow Americans as to the Constitution in bespeaking tolerance for the Witnesses:

> It is our proud achievement to have demonstrated that unity and strength are best accomplished, not by enforced orthodoxy of views, but by diversity of opinion through the fullest possible measure of freedom of conscience and thought. . . . Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience.[70]

Justices Frankfurter, Reed, and Jackson dissented separately. Justice Frankfurter made the point usual to his philosophy that wide leeway should be given legislative judgment. Justice Reed observed that Struthers could and did prohibit ringing of doorbells in a community of many night-shift workers without banning other means of distribution. "Such assurance of privacy falls far short of an abridgement of freedom of the press," he asserted. Justice Jackson complained that the Struthers ordinance followed the directions of the

[68] *Martin* v. *City of Struthers*, 319 U.S. 141 (1943).
[69] *Ibid.*, 148.
[70] *Ibid.*, 150–51.

court previously given and was narrowly drawn to prevent an undesired practice without censorship or license. In addition, he criticized the Witnesses in this way:

> Civil government can not let any group ride roughshod over others simply because their "consciences" tell them to do so. . . .
>
> Nor am I convinced that we can have freedom of religion only by denying the American's deep-seated conviction that his home is a refuge from the pulling and hauling of the market place and on the street. For a stranger to corner a man in his home, summon him to the door and put him in the position either of arguing his religion or of ordering one of unknown disposition to leave is a questionable use of religious freedom. . . . The court has, in one way after another, tied the hands of all local authority and made the aggressive methods of this group the law of the land.[71]

THE LINE BETWEEN RELIGION AND COMMERCE

When the courts were confronted with the practice of polygamy as a part of the religious belief of the Mormons, Chief Justice Waite divided religion into departments of action and belief, and restricted the powers of Congress to the former.[72] "While freedom of religious belief is a constitutional right, freedom in the *mode of expressing* that belief is not a constitutional right." The Supreme Court in the Jehovah's Witnesses cases had to decide what of truth and what of error was contained in the *Reynolds* rule. In the end it had ruled in effect that some modes of expressing religious belief are constitutional rights, though all members of the court were not agreed.

The court faced this problem particularly in a series of cases in which license fees were required of distributors of printed matter on streets and in homes. Since there is no dispute over applying reasonable and nondiscriminatory fees to business licenses, it became important to decide: (1) the extent to which a Jehovah's Witness, who sells his literature, is subject to business licensing laws and fees; and (2) the characteristics of fees which determine when they are reasonable, as against the characteristics which denote unreasonableness.

Many of the early Jehovah's Witnesses cases raised this issue and some courts decided that books and pamphlets, "worldly or religious," are merchandise, and one who sells merchandise must have the license required. On other occasions, where public-interest pam-

[71] *Douglas* v. *Jeannette*, 319 U.S. 157, 179, 180–81 (1943). This dissent applied to the *Struthers* case, though attached to *Douglas*: "I therefore dissent in *Murdock* and *Struthers* and concur in the result in *Douglas*." The latter case dealt with procedure in equity, primarily. The *Murdock* opinion voided the Jeannette ordinance too.

[72] *Commonwealth* v. *Palms*, 15 A. 2d 481 (1940); *Reynolds* v. *United States*, 98 U.S. 145, 164, 165–67 (1878).

phlets were concerned, though they were offered for sale, the opposite ruling was made.[73] The fee, which would restrict circulation, was invalid as unreasonable and discriminatory, "and as an infringement of the First and Fourteenth Amendments," some court rulings had held.[74]

The fee issue was latent in several cases where the ordinances were void per se, but in *State* v. *Greaves*[75] the supreme court of Vermont held that a ten-dollar tax for a distributor's license restricted circulation under the rule of *Grosjean* v. *American Press Co.* The supreme court of Illinois, in *City of Blue Island* v. *Kozul,* passed on a license fee of four dollars a day with a twenty-five-dollar annual maximum, as applied to Jehovah's Witnesses. Illinois guarantees of liberty were probably wider than the federal Constitution, and either the tax or discretion on issuance of license would have violated them. Its rule in this case came to be adopted by the United States Supreme Court. Said the opinion: "The publishers and distributors . . . cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the Constitution.[76]

At least in its application to the distribution of matter protected under freedom of the press, as distinguished from freedom of religion, the ordinance was void.

The Court Reverses Itself

These were the conflicting currents when the Supreme Court of the United States decided *Jones* v. *Opelika.*[77] Freedom of press lost the first round but not the decision, for, little more than a year after first deciding the case, the court reconsidered and adopted the former minority opinion as the rule.

The opinion which finally became that of the court was written by Chief Justice Stone. He read the First Amendment, as applied by the Fourteenth against the state, quite simply and literally. No law was to be enacted abridging freedom of speech or press, and the ordinance in each of the cases was "on its face a prohibited invasion of the freedoms thus guaranteed, and . . . the judgment in each case should be reversed."[78] Justice Stone explained that both the license

[73]A case of the first class is *Commonwealth* v. *Anderson,* 172 N.E. 114 (1930) in the supreme judicial court of Massachusetts; an example of the second group is *People on Complaint of Mullaly* v. *Banks,* 6 N. Y. S. 2d, 41 (1938), in a New York City magistrates' court.

[74]*People* v. *Banks,* 6 N. Y. S. 2d 41, 46 (1938).

[75]22 A. 2d 947 (1941).

[76]41 N.E. 2d 515, 519 (1942).

[77]*Jones* v. *Opelika,* 316 U.S. 584 (1942); vacated and new opinion adopted, 319 U.S. 103 (1943).

[78]*Jones* v. *Opelika,* 316 U.S. 584, 600 (1942). Companion cases were *Bowden* v. *Fort Smith* and *Jobin* v. *Arizona.*

requirement and the annual tax, added to a fifty-cent "issuance fee," voided the Opelika ordinance. The license was issued to all applicants without question, but its effective enjoyment was dependent wholly upon administrative whim. The chief justice said that this kind of censorship is as effective as prior censorship, and that the Alabama city had an ordinance "more callous" in its disregard of the Constitution than Griffin, Georgia, for at least Griffin did not put a price on the exercise of the privilege of free speech.[79]

Justice Reed, in the opinion that finally became the minority, had argued that the decision of the state courts had foreclosed the question of reasonableness of the fee, and he asserted:

> When proponents of religious or social theories use the ordinary commercial methods of sales of articles to raise propaganda funds, it is a natural and proper exercise of the power of the state to charge reasonable fees for the privilege of canvassing. Careful as we may and should be to protect the freedoms safeguarded by the Bill of Rights, it is difficult to see in such enactments a shadow of prohibition of the exercise of religion or of abridgement of the freedom of speech or the press.[80]

Chief Justice Stone, however, saw more than a "shadow" on freedom. His words indicate that he feared a total eclipse of the constitutional rights. The cumulative effect of such taxes on an itinerant evangelist would be prohibitive even if a tax were said to be reasonable in terms of one town. Anyway, Opelika freely admitted that its tax was a revenue measure.

The court had approved the principle that a state may charge a reasonable fee to defray the cost of licensing.

> But we are not concerned in these cases with a nominal fee for a regulatory license, which may be assumed, for argument's sake, to be valid. Here the licenses are not regulatory, save as the licenses conditioned upon payment of the tax may serve to restrain or suppress publication. None of the ordinances, if complied with, purports to, or could, control the time, place, or manner of the distribution of the books and pamphlets concerned. None has any discernible relationship to police protection or the good order of the community. The only condition and purpose of the licenses under all three ordinances is suppression of the specified distributions of literature in default of the payment of a substantial tax fixed in amount and measured neither by the extent of the defendant's activities

[79]The license was ten dollars a year for book agents and five dollars a year for transient book agents. Other fees stipulated ranged from five dollars to seventy-five dollars a year, and the vagueness of the classifications doubtless gave a city official some bargaining power with peddlers whom he might consider undesirable. The Casa Grande, Arizona, fee was twenty-five dollars a quarter, and the Fort Smith range was from two dollars and fifty cents a day to twenty-five dollars a quarter.

[80]*Jones* v. *Opelika*, 316 U.S. 584, 597 (1942).

under the license nor the amounts which they receive for and devote to religious purposes in the exercise of the licensed privilege. . . . The tax of $25 per quarter exacted by the Casa Grande ordinance, adopted in a community having an adult population of less than 1000 . . . is prohibitive in effect.[81]

The chief justice said that the First and Fourteenth amendments extend "at least to every form of taxation which, because it is a condition of the exercise of the privilege, is capable of being read to control or suppress it." The type of flat tax used here had been held illegal when applied to interstate commerce, and its weakness when applied to the Witnesses was that it had to be paid in advance without reference to earnings on use of the privilege. "On its face," the opinion said, "a flat license tax restrains in advance the freedom taxed and tends inevitably to suppress its exercise." Such taxes would be a way of evading the constitutional guarantees.[82] And "the more humble and needy the cause, the more effective is the suppression."

Justice Murphy, in a separate opinion, called upon the country, as he had done in the *Struthers* case, for the kind of tolerance that brings unity and strength. He felt that the trial court erred in excluding testimony that Jones' activities in Opelika were part of his ministerial duties and in classing him simply as a book agent. Thus the city was enabled to tax the dissemination of religious ideas, in defiance of American tradition and the Constitution. The question of amount did not concern Justice Murphy; any tax so applied violated freedom of speech and press.[83]

> Freedom of speech and freedom of the press cannot and must not mean freedom only for those who can distribute their broadsides without charge . . . [The pamphlets of Tom Paine were not distributed gratuitously.] The pamphlet, an historic weapon against oppression is today the convenient vehicle of those with limited resources because newspaper space and radio time are expensive and the cost of establishing such enterprises great. If freedom of speech and freedom of the press are to have any concrete meaning, people seeking to distribute information and opinion, to the end only that others shall have the benefit thereof, should not be taxed for circulating such matter.[84]

Tax and License Powers Limited

The court decided, on the same day it overturned the *Jones* v.

[81] *Ibid.*, 605–6.
[82] *Ibid.*, 609, 610, 611.
[83] *Ibid.*, 611–16.
[84] *Ibid.*, 619.

Opelika opinion, the case of *Murdock* v. *Pennsylvania*.[85] Justice Douglas wrote the majority opinion invalidating a city license tax ranging from $1.50 per day to $7.50 for one week and $20.00 for three weeks. The Pennsylvania superior court had not treated the activities of Jehovah's Witnesses as religious rites and functions, and thus the tax was applied to them as to the business of peddling books. Justice Douglas felt that their activity

> is more than preaching; it is more than distribution of religious literature. It is a combination of both. Its purpose is as evangelical as the revival meeting . . . It has the same claim to protection as the more orthodox and conventional exercises of religion.[86]

From this point of view, religious colporteurs could not be compelled to pay a license tax "as a condition to the pursuit of their activities." The incidental fact that the religious tracts were sold, not given away, did not affect the constitutional guarantee. "If it did," Justice Douglas remarked, perhaps with a hint of a twinkle in his judicial eye, "then the passing of the collection plate in church would make the church service a commercial project."[87]

Justice Reed dissented. As far as he could see, the Watchtower Bible and Tract Society was a business organization, conducting a wholesale business and keeping a middleman's profit. He could not find in the history of the First Amendment any intent to foreclose simple business taxes, and he felt that if the notorious English taxes on knowledge had been in the minds of the committee which proposed the amendment, definite stipulation would have been added. "It may be concluded that neither in the state nor the federal constitutions was general taxation of the church or press interdicted."[88]

According to Justice Reed's interpretation, the majority opinion did not invalidate income taxes, ad valorem taxes, or even occupational taxes. The illegal exception was presumably a license tax on sales of religious books. Then he posed the question of applying the same principle to the newspaper business. Would distributors of newspapers be exempt from an occupational tax? The rites which he took to be protected were "in essence spiritual—prayer, mass, sermons, sacrament—not sales of religious books." And he insisted that charging for religious books removed their sale from the "realm of a religious rite."[89]

[85] 319 U.S. 105 (1943).
[86] *Ibid.*, 109.
[87] *Ibid.*, 110–11.
[88] *Ibid.*, 119, 127.
[89] *Ibid.*, 129, 132.

Justice Frankfurter separately dissented. He felt that to deny a municipality the opportunity to assess the costs of regulation against street hawkers and canvassers subsidized them and offended the principle of separation of church and state.[90] Justice Jackson's dissent was reported under the *Struthers* case (page 150).

This series of cases does not suggest that the issue is settled; it seems, rather, to be held in abeyance. The pressure on the court to maintain the present clear-cut position in support of its interpretation of freedom is only the pressure of conscience of a majority of the justices. As shown in the overtones of Justice Jackson's opinion, patience has run out for those who value their irritability above the distant concepts of tolerance, brotherhood, and freedom.

The approval given a nominal fee to defray no more than the cost of regulatory license called, on its own account, for further definition. In *Busey* v. *District of Columbia* the United States court of appeals for the district made the government unit involved responsible for proving that the fee was reasonable and did not invade constitutional freedom. Without proof that a fee was "small and nominal," its application to literature was to be deemed unconstitutional.[91]

SOME PERMISSIBLE RESTRICTIONS

Clearly underlying all decisions in the Jehovah's Witnesses series has been the understanding that some regulation in the public interest may be necessary. Such restriction, however, must stop short of infringing the rights detailed in the First Amendment.

There is a series of reported cases which indicate some aspects of permitted restraint. *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission* in 1926 involved two of the most sensitive areas of freedom, a newspaper and an order of a government administrative board affecting it. The newspaper was subsidized by the chamber, which operated a special protective service for its grain-dealer members, and it was accused before the Federal Trade Commission of publishing false statements concerning the "financial responsibility and business members" of a cooperative grain market association, the Equity Cooperative Exchange.

[90] *Ibid.*, 134.

[91] 138 F. 2d 592, 595–96. Other cases in which license fees were held void include *Whisler* v. *City of West Plains*, 137 F. 2d 938 (1943); *McConkey* v. *City of Fredericksburg*, 19 S.E. 2d 682 (1942); *State ex rel. Singleton* v. *Woodruff*, 13 So. 2d 704 (1943); and *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). In the latter case the court had to decide whether or not to distinguish between a Jehovah's Witness making his living in distributing tracts and one, as in *Opelika* and *Murdock*, who followed his ministry only on a part-time basis. Would a license fee chargeable to a business pursuit apply to the full-time Witness? No, said the court.

The Federal Trade Commission handed down a cease-and-desist order censoring further false material about the Equity group. The order directed the chamber to discontinue publishing in its newspaper material which misrepresented the exchange, with the word "misrepresent" to be defined by the commission.[92] The court asserted that there was jurisdiction to issue an order thus affecting an instrumentality of the press. Admitting that there was no jurisdiction in equity to enjoin publishing a libel, the court asserted that this was not a constitutional prohibition and might be changed by statute, and that in any case restraint was proper against publications being used to carry out a boycott or a conspiracy. The same powers given the courts to enforce orders of the Federal Trade Commission were conferred in connection with the National Labor Relations Act, and it may be seen that on strict constitutional grounds the possibility of bureaucratic regulation of the press has a substantial legal basis. The courts are fenced away from independent examination of the facts in both Federal Trade Commission and NLRB procedure.

The public safety was said to warrant an ordinance in Melbourne, Florida, which forbade distributing printed matter to persons in automobiles, moving or stopped by a traffic light, at a few designated street intersections.[93]

An Oklahoma City ordinance prohibiting the use of violent, abusive, or insulting language, the display of abusive devices calculated to cause a breach of the peace, and remarks about any religion likewise tending to disturb the peace, was held valid when properly applied. Jehovah's Witnesses who challenged the constitutionality of the ordinance in federal court, in advance of a trial on the issue, accordingly had to stand trial.[94]

In Illinois Jehovah's Witnesses accused under an ordinance having the same effect as the Oklahoma City statute charged that a prior licensing system was created and raised the question in federal court. They had been accused of actions and representations affecting members of the Roman Catholic church so as to provoke breaches of the peace. The court declined to enjoin the prosecution of a criminal charge, pointing out that the result could be examined for its effect on freedom of the press and speech. But the court acknowledged the existence of a temporary censorship inherent in criminal action and condoned it. Here the danger to freedom of expression was not held

[92] *Chamber of Commerce of Minneapolis* v. *Federal Trade Commission*, 13 F. 2d 673, 696–97 (1926).

[93] *Stephens* v. *Stickel*, 200 So. 396 (1941).

[94] *Oney* v. *Oklahoma City*, 120 F. 2d 861, 865 (1941).

immediate and the Witnesses could avert it themselves, they were told, by distributing less objectionable literature pending full adjudication of cases in state courts.[95]

The Illinois supreme court, reviewing the case, held that the state had not proved distribution of literature in a public place, but only in private homes, and no violations of the statute were involved.[96] The defendants were discharged.

A Kansas City ordinance, preventing the Witnesses from operating in the streets within a block of any theater, church, school, or public building, requiring simple registration of persons engaged in solicitations for religious purposes, and lodging no discretion in officials, was upheld in federal district court.[97]

The recognized restriction on commercial matter and the recognized freedom of the American to shoot off his mouth were complexly interwoven in the case of *Valentine* v. *Chrestensen,* and the court was forced into a test based on motive to decide the question.[98] Chrestensen owned a submarine (formerly belonging to the United States Navy) which he wished to tie up at a city-owned dock and exhibit on a paid admission basis. A city ordinance flatly forbade distribution of commercial handbills in the streets, and a ruling of the city dock department denied Chrestensen permission to tie up at a city pier.

When police stopped distribution of handbills advertising the exhibition at another location, Chrestensen printed his complaint against the dock department on the reverse side of his handbill and started distribution. The rather neat question resulting then was put to the court.

Chrestensen won his case all the way to the Supreme Court of the United States, but here the court said:

> We need not indulge nice appraisal based upon subtle distinctions in the present instance nor assume possible cases not now presented. It is enough for the present purpose . . . that the affixing of the protest against official conduct to the advertising circular was with the intent, and for the purpose, of evading the prohibition of the ordinance.[99]

A Massachusetts statute, applied against Jehovah's Witnesses, provided that no boy under twelve nor girl under eighteen years of age should sell anything on the streets. It was held constitutional in the

[95] *Bevins* v. *Prindable,* 39 F. Supp. 708, 712 (1941). Affirmed, 314 U.S. 573 (1941).
[96] *People* v. *A. R. Simcox,* 379 Ill. 347 (1942).
[97] *Mickey* v. *Kansas City,* 43 F. Supp. 739 (1942).
[98] 316 U.S. 52 (1942).
[99] *Ibid.,* 55.

United States Supreme Court. Justice Murphy dissented. He regretted the step toward depriving parents of complete control over the religious indoctrination of their children, and toward state interference in the supervised participation of children in religious practices with their parents. Justice Jackson, with Justices Roberts and Frankfurter, separately dissented, holding that the *Murdock* case forbade classification on the basis of age and that the rule in the present case would force discrimination between religious denominations.[100]

An ordinance of Moultrie, Georgia, narrowly drawn to prevent hawking or peddling of literature in the congested business area between 12 noon and 9 P.M. on Saturdays, was held a valid use of the police power for public safety and convenience.[101]

A Jehovah's Witness, operating in a company town on what she thought was a street dedicated to public use, was found guilty of trespass after the state court ran down title to the property. Grateful, no doubt, for such a prosaic rule with which to settle an emotionally charged issue, the court delivered a little Bible lesson of its own, advising the Witnesses to "shake off the dust of your feet" when warned to stay away from private property.[102] The United States Supreme Court, however, found the property dedicated to public use and reversed the decision.

USES OF STREETS AND PARKS

The rule in *Davis* v. *Massachusetts*,[103] a case decided in 1897, has been applied on two or three notable occasions in the last decade. When Father Coughlin sued the Chicago Board of Park Commissioners for a permit to use Soldier Field for an address to one hundred thousand persons, including members of National Union for Social Justice, he was turned down by the supreme court of Illinois. The court explained:

> Mandamus is designed to compel action along lines marked out by the law and on behalf of the person seeking its aid and against the person whose duty the law has declared. If the officer has a discretion, mandamus will not issue to control his action. It may be issued to compel the exercise of discretion, but not the manner of its exercise.[104]

[100] *Prince* v. *Commonwealth of Massachusetts*, 321 U.S. 158 (1944).

[101] *Ferguson* v. *City of Moultrie*, 29 S.E. 2d 786 (1944).

[102] *Marsh* v. *State*, 21 So. 2d 558, 563 (1945); 66 Sup. Ct. 276 (1946).

[103] 167 U.S. 43 (1897). "There was no right in the plaintiff in error to use the common except in such mode and subject to such regulations as the legislature in its wisdom may have deemed proper to prescribe," p. 47.

[104] *Coughlin et al* v. *Chicago Park District*, 4 N.E. 2d 1, 9 (1936). A street gathering in Tacoma, Washington, was subjected to police regulation by the supreme court of Washington under the *Davis* rule in *City of Tacoma* v. *Roe*, 68 P. 2d 1028 (1937).

The most spectacular case arising under the rule was *Hague* v. *CIO,* in which Mayor Frank Hague's baronial tyranny was checked.[105] The mayor's director of public safety was clothed with power under an ordinance to issue permits for meetings in streets and parks and used his discretion to deny the CIO a permit. The labor organization was conducting a drive to unionize Jersey City industry, and its activities were in pursuit of its rights as defined in the National Labor Relations Act. The union charged not only censorship through failure to issue a permit for a meeting, but a long series of violent interferences with the distribution of pamphlets and with the personal liberty of CIO organizers to enter Jersey City.

The case was argued under the privileges and immunities guarantee of the Fourteenth Amendment. The court said:

> . . . it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the amendment protects.[106]

The *Davis* rule was clarified. The court said that the right to use the streets may be regulated in the "interest of all," but "it must not, in the guise of regulation, be abridged or denied." The ordinance was void on its face, the decision having the effect of permitting lawful meetings without a permit.[107]

Justice Stone, in a concurring opinion, objected to having the decision made on the basis of the privileges and immunities of citizenship, affirming that the rights denied by Jersey City belonged to all persons, citizen or not.[108]

The protection of the First Amendment has been claimed against powers of the government to allocate radio station wave lengths and denied under the general philosophy of the *Davis* rule. Though radio powers arise in interstate commerce, the "public convenience and necessity" formula is present, and the reasons for policing the air waves are the same as for policing the streets.

Trinity Methodist Church, South v. *Federal Radio Commission* affirmed the denial of a renewal certificate to a minister who had tried the community's patience with his broadcasts, which the court termed slanderous and obscene.[109] *National Broadcasting Co., Inc.* v. *United States,* in which the regulatory power survived the onslaught

[105] 307 U.S. 496 (1939).
[106] *Ibid.,* 512.
[107] *Ibid.,* 516. See Chafee, *Free Speech in the United States,* pp. 409–38.
[108] 307 U.S. 496, 519.
[109] 62 F. 2d 850 (1933).

of the giant in the radio industry, even to the point of breaking up trade practices and network affiliations, turned on the same basic issue. "The right of free speech does not include, however, the right to use the facilities of radio without a license."[110] The standard provided, that of public convenience and necessity, was sufficient justification for the inevitable restrictions on freedom of speech.

Justice Murphy, however, along with Justice Roberts, disagreed because he could not see where Congress had given the Federal Communications Commission power over contractual relationships of licensees.

The courts have approved the censorship of publications deemed to be for an unlawful purpose. A New York case sustained the conviction of a dealer selling magazines "which purported to contain true cases of crimes from public records and files."[111] The court said:

> The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state.[112]

An ordinance of Cleveland, Ohio, prevented the sale of papers containing horse-racing news "or tips on horse races."[113] It was applied against the newspapers of general circulation in Cleveland, upheld by the Ohio court of appeals, and affirmed in effect by the supreme court of Ohio on appeal with the statement that no constitutional question was involved. The appeals court said that gambling is a crime and newspapers carrying racing news "aid and abet a crime." Big or little, no newspaper publisher has a vested interest in "the debauching of his fellow citizens and the making of it easy for them to go astray."[114]

A racing news service was denied wire facilities, and thus forced out of business, by *Howard Sports Daily, Inc.* v. *Weller,* a Maryland case.[115] The court said that unquestionably the service was used to further gambling pursuits and allowed the state Public Service Commission to compel cancellation of wire-lease contracts. The news agency raised the question of freedom of the press because it also had

[110] 319 U.S. 190, 227 (1943).

[111] *People* v. *Winters,* 48 N. Y. S. 2d 230 (1944). The statute authorized punishment for misdemeanor of a person who "prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers . . . any book, pamphlet, magazine, newspaper or other printed matter devoted to the publication and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust, or crime "

[112] *Ibid.,* 231–32. Certiorari granted, 66 Sup. Ct. 956.

[113] *Solomon* v. *City of Cleveland,* 159 N.E. 121 (1926).

[114] *Ibid.,* 123.

[115] 18 A. 2d 210 (1941).

been publishing a daily newspaper devoted to sports. But the court would not lend its aid to enforcing an illegal contract which was "inconsistent with sound morals or public policy," and freedom of the press was not considered at stake.

THE RIGHTS OF ADVERTISING DISTRIBUTORS

The constitutional protection which attends distribution of information in the public interest does not extend to commercial advertising matter. Some confusion exists on the point, but nevertheless the legal pattern is fairly clear, especially since *Valentine* v. *Chrestensen.* The element of confusion is well illustrated, however, by the fact that the decision favored Chrestensen in the circuit court of appeals. The ordinances construed in the series of Jehovah's Witnesses cases were intended to cover advertising distribution and canvassing by salesmen, and it was not clearly understood that these ordinances were, in the main, left intact insofar as advertising matter was concerned.

Jell-O Co. Inc. v. *Brown,* in 1926, challenged, under the due process clause of the Fourteenth Amendment, the application of a distributor's license fee of ten dollars a month to one of a food distributor's crews placing samples in homes.[116] As many workers as the distributor desired were covered by the fee, and Jell-O, Incorporated, said it would take its crew two months to get the job done. It also said the fee burdened interstate commerce. The court, however, held the fee to be a reasonable exercise of the police power: "The city is not required to supervise the distribution at its own expense, but may assess a reasonable fee for such supervision."[117] The same need to identify canvassers present in the distribution of public-interest material was noted.

The Reuben H. Donnelley Corporation challenged an ordinance of Bellevue, Kentucky, which levied a license tax of twenty-five dollars a year or one dollar a day per distributor of advertising and merchandise samples. The company relied on *Lovell* v. *Griffin,* but the court explained that the Bellevue ordinance did not apply to literature but "only imposes a tax upon the privilege of carrying on the business of advertising in a particular manner."[118]

The corporation argued that the tax interfered with circulation, as in the *Grosjean* case, and again the court explained the differences between advertising matter and public-interest material. This fee,

[116] 3 F. Supp. 132 (1926).
[117] *Ibid.,* 133.
[118] *Reuben H. Donnelley Corporation* v. *City of Bellevue,* 140 S.W. 2d 1024, 1026 (1940).

said the court, was reasonable and could even be applied to a newspaper publisher operating for profit. "The business of advertising possesses no virtue justifying immunity from the ordinary license or other taxes. Freedom of speech or publication does not authorize it."[119]

A New York City ordinance forbade throwing advertising matter "in or upon any street or public place, or in a front yard or court yard, or on any stoop, or in the vestibule, or any hall of any building, or in a letterbox therein."[120] The ordinance stipulated that it was not intended to apply to anything except commercial and business advertising matter. The evidence in the case showed illegal distribution. The court said, in effect, that it is one thing (and valid) to keep the streets from being littered with commercial paper, and another thing (and invalid) to use such reasons to hide censorship, or, as Judge Clark said in *Hague* v. *CIO,* "for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and . . . perhaps, being frightened."[121]

The fundamental protection of the Constitution did not apply, the court said, to advertising and soliciting patronage for purely commercial enterprise. The rights of freedom of press and speech may not be perverted to personal profit, the court said, finding the defendants guilty of violating the ordinance.

A similar ordinance was applied against the owner of a shopping newspaper in South San Francisco and was upheld, despite his vigorous assertions that the city fathers in passing the ordinance intended to favor the regular newspapers by interfering with his business.

A shopping newspaper is an advertising circular in newspaper form. It is distributed free from house to house, and very often its operations seriously curtail the business of bona fide newspapers. Advertisers who buy space and services without much consideration for the social values of the media they use help sustain shopping newspapers. The shopping newspaper in this case was not a nuisance per se, perhaps, but legislative action can regulate and prohibit things not declared to be nuisances so long as the action is reasonable. And the test of reasonableness will be the relationship of the regulation to the purpose of the act and its tendency to preserve and promote public safety.

The ordinance . . . does not purport to prohibit the business of publishing or distributing a paper of the class to which the appellant's prod-

[119] *Ibid.*, 1026.
[120] *People* v. *La Rollo*, 24 N.Y.S. 2d 350 (1940).
[121] *Ibid.*, 352.

uct belongs. The ordinance merely forbids the distribution of such publication by placing it into an automobile, yard, porch, or mail box "not in possession or under the control of the person so distributing the same."[122]

Bona fide newspapers were of course permitted to continue a method of distribution denied to the advertising sheet, and that accounted for the anguish of the shopping newspaper owners. The ultimate question, said the court, was this:

If the appellant's publication belongs to a class of papers which, when delivered according to the method forbidden by the ordinance, can reasonably be said to increase the city's fire hazard, even though the appellant's *particular* publication is delivered according to the forbidden method with such a superabundance of caution that no fire hazard could conceivably result, nevertheless the ordinance is not unconstitutional, and the appellant's publication is subject to its provisions.[123]

Newspapers were included in the general terms of a similar ordinance of Riverside, California, but an escape for them was provided by making any distribution lawful if with the consent of the owner of the premises, or if handed on the streets to a person willing to accept. Said the court:

I cannot see how this ordinance, and especially the provisions in Sections 4, 5, and 6, requiring the permission of the owner of property before putting handbills or advertising on it, can be said to violate the right of a free press.[124]

The court recalled that zoning, erecting billboards without consent, and even soliciting custom and patronage in railroad stations or near them, all may be legally dealt with by legislation. The ban on the shopping news distribution is not a regulatory ordinance, the court said, but a criminal, prohibitory ordinance. It does not call for the issuance of permits by city officials.

CENSORSHIP OF POLITICAL ACTIVITY

In regulating undue influences on elections, the Florida legislature has labeled it an improper practice to circulate charges against candidates within eighteen days of a primary election without serving a copy of the charge on the person criticized. This law was tested by action based on a radio address by a candidate for county solicitor, attacking his opponent, the incumbent solicitor, and reported in his newspaper by an editor.

[122] *San Francisco Shopping News Co.* v. *City of South San Francisco*, 69 F. 2d 879, 890 (1934).
[123] *Ibid.*, 891.
[124] *Buxbom* v. *City of Riverside*, 29 F. Supp. 6 (1939).

The incumbent prosecutor promptly filed charges against both the editor and the rival candidate. The law, said the court, was intended to confine campaigning to the platform or stump and radio and did not affect statements made in that manner. Statements limited were those

> in written or visual form and thereafter scattered surreptitiously against the candidate without his having an opportunity to prepare and circulate a defense by like visual means after being served with a copy thereof.[125]

The law, which provided a sort of Marquis of Queensbury rule for political campaigning, was upheld, but since it did not apply to newspaper accounts of radio speeches both accused persons were freed.

A Kansas statute, of a form common throughout the land, required that political campaign literature bear either the names of the chairman and secretary or of two officers of the political organization issuing it, or the name of some voter responsible for it, with his street address. The supreme court of Kansas upheld the restriction, saying that nothing in the state bill of rights prohibited the legislature from regulating anonymous writings or publications.[126]

The United Public Workers of America, a CIO union, attacked the Hatch Act as creating a ban on freedom of speech and press, but without success.[127] It was contended that the act denied a fundamental right to engage in political activity and expression as guaranteed by the First, Fifth, Ninth, and Tenth amendments.

Justice Stanley Reed of the United States Supreme Court said that federal employees have nearly always worked under certain restrictions and that the Hatch Act is part of a public policy assuring them more security of tenure and tending toward a more faithful performance of duty. While declining to render a declaratory judgment in the case of several petitioners who, though not yet actually in conflict with the act, wished to participate in actions clearly violating the law, the court found against an employee of the United States mint who admitted violating the act and whose job status was under attack.

The court said that the act did not take away the right to express political opinion, but did keep a federal employee, covered by the act, from taking active part in political campaign management on behalf of a political party. The decision meant that when a citizen became a government employee covered by the act he lost freedom of expression, freedom of action, and the right to take a citizen-leader's part in public affairs connected with political parties. The disadvantages

[125] *Ex parte Hawthorne, ex parte Mahoney*, 156 So. 619, 622 (1934).
[126] *State* v. *Freeman; State* v. *Ewing; State* v. *Moser*, 55 P. 2d 362. 365 (1936).
[127] *United Public Workers of America (CIO)* v. *Mitchell*, 65 Sup. Ct. 556 (1947).

in such a situation were pointed out by Justices Black, Douglas, and Rutledge in dissents. Since Justices Murphy and Jackson took no part, the decision was four to three.

SUMMARY

The evangelical activities of Jehovah's Witnesses have presented the courts with a series of cases in which the freedoms guaranteed in the Constitution have had to be defended against human resentment and irritation. The cases have centered in state and city legislation restricting and regulating hawkers, solicitors, and canvassers, and in one or two cases, in ordinances abridging the right of assembly.

As a result, the Supreme Court of the United States has overthrown all ordinances and statutes vesting discretion to issue and revoke licenses insofar as they apply to distributors of public-interest information not too deeply involved in profit motives. License fees may not be charged, because such fees levied uniformly in advance restrict circulation, and the cumulative effect of even small fees on itinerant distributors is to violate the Constitution. Small regulatory fees, reasonable to the extent of being nominal, may be charged, but the burden of proof as to reasonableness of the fee must be upon the government.

Commercial advertising matter has no such privileges. Its distributors are subject to absolute prohibition, conditional restraint clearly related to public welfare, or regulation, so long as due process and discretion are not abused. The unreasonableness of a license fee must be challenged and proved by the distributor.

Ordinances narrowly drawn to protect the public interest may reasonably regulate as to time, place, and manner of distribution, but few reasonable regulations have come before the court. The restriction of literature distribution in crowded business areas, at critical times of day, or near churches, theaters, and public buildings has been upheld.

The citizens of a community may not decide by ordinance a matter which is traditionally left to individual choice. Thus an ordinance may not interdict doorbell ringing, though the enforcement of warning after trespass laws, which leave the discretion to each individual householder, is traditionally upheld. Traffic in religious literature, distributed by persons engaged in an act of worship, is not commerce and may not be regulated as such. The fact that such literature may be sold upon occasion does not remove its constitutional protection.

Newspapers usually are exempted from the ordinances regulating the distribution of literature, but a newspaper subscription solicitor is

engaged in commerce and is subject to license taxes. But no tax on public-interest material is valid which "as a condition of the exercise of the privilege, is capable of being made to control or suppress it." The use of streets and parks has not been modified by the Jehovah's Witness and labor cases since *Davis* v. *Massachusetts* in 1897. People have a right to hold street meetings and parades, and no ordinance may do more than reasonably regulate the use they make of the public facilities of streets and parks. A board vested with discretion in keeping with the public interest may not be compelled to make a specific decision if the one made without compulsion is clearly reasonable.

The landmark case of *Near* v. *Minnesota* in 1931 focused attention upon administrative license of speech and press and marked it for what it is, old-fashioned censorship. This case sharpened and clarified the statements of principle by which the abuses have been subjected to elimination or control. Other cases in the series which were major incidents in the constitutional history of freedom are *Lovell* v. *Griffin, Schneider* v. *State, Jones* v. *Opelika, Murdock* v. *Pennsylvania,* and *Martin* v. *City of Struthers.*

A SELECTED BIBLIOGRAPHY

Books

ADAMS, RANDOLPH GREENFIELD. *Political Ideas of the American Revolution.* New York: Facsimile Library and Barnes and Noble, 1939.

ALFANGE, DEAN. *The Supreme Court and the National Will.* Garden City: Doubleday, Doran, 1937.

AMERICAN CIVIL LIBERTIES UNION. *Liberty's National Emergency.* New York, 1941.

BELLOC, HILAIRE. *The Free Press.* London: George Allen and Unwin, 1918.

BERNHARD, EDGAR, IRA LATIMER, and HARVEY O'CONNOR. *Pursuit of Freedom, a History of Civil Liberty in Illinois, 1787–1942.* Chicago: Chicago and Illinois Civil Liberties Committee, 1942.

CHAFEE, ZECHARIAH, JR. *Free Speech in the United States.* Cambridge: Harvard University Press, 1942.

CHEYNEY, EDWARD P. (ed.) *Freedom of Inquiry and Expression.* Annals of the American Academy of Political and Social Science, Vol. 200. Philadelphia, 1938.

CLYDE, WILLIAM M. *Struggle for the Freedom of the Press from Caxton to Cromwell.* London: Humphrey Milford, 1934.

COLLET, COLLET DOBSON. *History of the Taxes on Knowledge,* 2 vols. London: T. Fisher Unwin, 1899.

COOPER, KENT. *Barriers Down.* New York: Farrar and Rinehart, 1942.

CORWIN, EDWARD S. *Court Over Constitution.* Princeton: Princeton University Press, 1938.

CZATT, MILTON STACEY. *The International Bible Students Jehovah's Witnesses.* New Haven: Yale University Press, 1933.

ERNST, MORRIS LEOPOLD. *The First Freedom.* New York: Macmillan, 1946.

FIELD, MARSHALL. *Freedom Is More Than A Word.* Chicago: University of Chicago Press, 1945.

FRAENKEL, OSMOND K. *Our Civil Liberties.* New York: Viking, 1944.

PATTERSON, GILES J. *Free Speech and a Free Press.* Boston: Little, Brown, 1939.

STORY, JOSEPH. *Commentaries on the Constitution,* Vol. II. Boston: Little, Brown, 1858.

STROUP, HERBERT HEWITT. *The Jehovah's Witnesses.* New York: Columbia University Press, 1945.

SULLIVAN, HAROLD W. *Contempts by Publication.* Privately printed, 1940.

UPSHUR, ABEL P. *Judge Story's Commentaries on the Constitution.* Philadelphia: John Campbell, 1863.

VILLARD, OSWALD GARRISON. *The Disappearing Daily.* New York: Knopf, 1944.

WARREN, CHARLES. *Jacobin and Junto.* Cambridge: Harvard University Press, 1931.

WICKWAR, WILLIAM H. *The Struggle for the Freedom of the Press, 1819–1832.* London: George Allen and Unwin, 1928.

Selected List of Articles

ANONYMOUS. "AP Brief Sees Free Press as Main Issue in Case." *Editor & Publisher,* Vol. 76, No. 28 (July 10, 1943), p. 7.

———. "AP Not a Public Utility, Appeal Briefs Emphasize." *Editor & Publisher,* Vol. 77, No. 46 (October 28, 1944), p. 7.

———. "Chicago Sun Brief Asks Real 'Associated Press.'" *Editor & Publisher,* Vol. 77, No. 48 (November 25, 1944), p. 9.

———. "Constitutional Law—Presumption of Constitutionality Not Applicable to Statutes Dealing with Civil Liberties." *Columbia Law Review,* Vol. 40, No. 3 (March 1940), p. 531.

———. "The Esquire Case. A Novel Extension of the Postmaster-General's Powers of Classifying Mail." *Yale Law Journal,* Vol. 53, No. 4 (September 1944), p. 733.

———. "Extension and Limitation of Thornhill v. Alabama." *Minnesota Law Review,* Vol. 25, No. 5 (April 1941), p. 641.

——. ("H.R.") "Freedom of Press and Religion." *Minnesota Law Review*, Vol. 28, No. 2 (January 1944), p. 133.
——. "The Hague Injunction Proceedings." *Yale Law Journal*, Vol. 48, No. 2 (December 1938), p. 257.
——. "Is National Labor Relations Act in Conflict with Freedom of Press?" *Harvard Law Review*, Vol. 57, No. 11 (September 1944), p. 1112.
——. "Supreme Court Rules Against AP, 5–3." *Editor & Publisher*, Vol. 78, No. 26 (June 23, 1945), p. 5.
BLIVEN, BRUCE. "Freedom of Speech and Press Fated to Decline." *Editor & Publisher*, Vol. 64, No. 36 (January 23, 1932), p. 11.
CHAFEE, ZECHARIAH, JR. "The Bill of Rights Belongs to the People." *Bill of Rights Review*, Vol. 2, No. 2 (Winter 1942), p. 92.
——. "Freedom of Speech in Wartime." *Selected Essays on Constitutional Law*, Vol. II. Edited by American Association of Law Schools. Chicago: Foundation Press, 1938, p. 1024.
COLE, KENNETH C. "Some Observations on the Significance of the American Bill of Rights." *Washington Law Review and State Bar Journal*, Vol. 18, No. 2 (April 1943), p. 90.
COOPER, KENT. "AP Put Under Court Control by Demand of FDR—Cooper." *Editor & Publisher*, Vol. 78, No. 43 (October 20, 1945), p. 11.
CORWIN, EDWARD S. "Freedom of Speech and Press under the First Amendment." *Selected Essays on Constitutional Law*, Vol. II. Edited by American Association of Law Schools. Chicago: Foundation Press, 1938, p. 1060.
CROSMAN, RALPH L. "The Los Angeles Times Contempt Decision—A Dangerous Holding." *Rocky Mountain Law Review*, Vol. 14, No. 3 (April 1942), p. 193.
CUSHMAN, ROBERT E. "National Defense and the Restriction of Civil Liberties." *Missouri Bar Journal*, Vol. 11, No. 8 (October 1940), p. 138.
——. "Some Constitutional Problems of Civil Liberty." *Boston University Law Review*, Vol. 23, No. 3 (June 1943), p. 335.
DEUTSCH, E. P. "Freedom of the Press and of the Mails." *Michigan Law Review*, Vol. 36, No. 5 (March 1938), p. 703.
——. "Liberty of Expression and Contempt of Court." *Minnesota Law Review*, Vol. 27, No. 3 (February 1943), p. 296.
DODD, E. MERRICK. "Picketing and Free Speech: A Dissent." *Harvard Law Review*, Vol. 56, No. 4 (January 1943), p. 513.
DRUMMOND, J. ROSCOE. "J. R. Drummond Discusses Press with Harold Ickes." *Editor & Publisher*, Vol. 72, No. 34 (August 26, 1939), p. 7.
ERNST, MORRIS L. "The So-Called Market Place of Thought." *Bill of Rights Review*, Vol. 2, No. 2 (Winter 1942), p. 86.
FRAENKEL, OSMOND K. "One Hundred and Fifty Years of the Bill of Rights." *Minnesota Law Review*, Vol. 23, No. 6 (May 1939), p. 719.
GEORGE, JOHN J. "Evidence in N.L.R.B. Cases in the Supreme Court." *Cornell Law Quarterly*, Vol. 30, No. 3 (March 1945), p. 350.
GOODRICH, HERBERT F. "Does the Constitution Protect Free Speech?" *Selected Essays on Constitutional Law*, Vol. II. Edited by American Association of Law Schools. Chicago: Foundation Press, 1938, p. 1068.
GREEN, JOHN RAEBURN. "Liberty under the Fourteenth Amendment." *Washington University Law Quarterly*, Vol. 27, No. 4 (Summer 1942), p. 497.
HALE, R. L. "Our Equivocal Constitutional Guaranties." *Columbia Law Review*, Vol. 39, No. 4 (April 1939), p. 563.
HALE, WILLIAM B. "Principles of Free Enterprise." *Bill of Rights Review*, Vol. 1, No. 3 (Spring 1941), p. 186.
HALLAM, OSCAR E. "Some Object Lessons on Publicity in Criminal Trials." *Minnesota Law Review*, Vol. 24, No. 4 (March 1940), p. 453.
HAMILTON, ALEXANDER. "Concerning Several Miscellaneous Objections." *The Federalist and Other Constitutional Papers*. Edited by E. H. Scott. Chicago: Albert Scott, 1894, p. 469.
HEMPSTEAD, WALTER EAST, JR. "Licensing of the Press under the N.I.R.A." *Oregon Law Review*, Vol. 13, No. 4 (June 1934), p. 359.
HERMAN, ROBERT E., and others. "Recent Limitations on Free Speech and Free Press." *Yale Law Journal*, Vol. 48, No. 1 (November 1938), p. 54.
HOWARD, FRED L. "Freedom of Speech and Labor Controversies." *Missouri Law Review*, Vol. 8, No. 1 (January 1943), p. 25.
JOHNSON, GERALD W. "Freedom of the Newspaper Press." *Annals of the American Academy of Political and Social Science*, Vol. 200. Edited by Edward P. Cheyney. Philadelphia, November 1938, p. 69.

JOHNSON, MALCOLM. "Record Shows Increasing FDR Hostility toward Press." *Editor & Publisher*, Vol. 77, No. 28 (July 8, 1944), p. 9.
KINSEY, WILLIAM H. "Recent Ramifications of the Application of Free Speech Doctrines to the Protection of Picketing." *Michigan Law Review*, Vol. 40, No. 8 (June 1942), p. 1200.
LASCH, ROBERT. "For a Free Press." *Atlantic Monthly*, Vol. 174, No. 1 (July 1944), p. 39.
LASHLY, JACOB M. "The Elusive Criteria of Constructive Contempt." *Bill of Rights Review*, Vol. 2, No. 2 (Winter 1942), p. 106.
LAWRENCE, DAVID. "Lawrence Reports First Amendment Vanishing." *Editor & Publisher*, Vol. 77, No. 18 (April 29, 1944), pp. 18, 116.
LEE, ALFRED MCCLUNG. "Violations of Press Freedom in America." *Journalism Quarterly*, Vol. 15, No. 1 (March 1938), p. 19.
LEVIN, ALBERT D. "The Constitutional Right to Work." *Commercial Law Journal*, Vol. 43, No. 6 (June 1938), p. 169.
LUSKY, LOUIS. "Minority Rights and the Public Interest." *Yale Law Journal*, Vol. 52, No. 1 (December 1942), p. 1.
MCCORMICK, ROBERT R. "Bureaucracy is Greatest Threat to Press Freedom—McCormick." *Editor & Publisher*, Vol. 72, No. 39 (September 28, 1940), p. xiv.
MANOFF, MARCUS. "The National War Labor Board and the Maintenance of Membership Clause." *Harvard Law Review*, Vol. 57, No. 2 (December 1943), p. 183.
MICHELSON, CHARLES. "Michelson Says 'No Government Plot to Infringe on Press Freedom.' " *Editor & Publisher*, Vol. 75, No. 50 (December 12, 1942), p. 7.
MULDER, JOHN E., and MARVIN COMISKY. "Jehovah's Witnesses Mold Constitutional Law." *Bill of Rights Review*, Vol. 2, No. 4 (Summer 1942), p. 262.
NELLES, WALTER, and CAROL WEISS KING. "Contempt by Publication in the United States." *Columbia Law Review*, Vol. 28, No. 4 (April 1928), p. 401 (Part I), and No. 5 (May 1928), p. 525 (Part II).
O'ROURKE, DENNIS. "Freedom of Press and Contempt of Court." *George Washington Law Review*, Vol. 7, No. 2 (December 1938), p. 234.
POUND, ROSCOE. "The Development of Constitutional Guarantees of Liberty." *Notre Dame Lawyer*, Vol. 20, No. 3 (March 1945), p. 183, and Vol. 20, No. 4 (June 1945), p. 347.
POWELL, THOMAS REED. "Authority and Freedom in a Democratic Society." *Columbia Law Review*, Vol. 44, No. 4 (July 1944), p. 473.
RATNER, MOZART G., and NORTON J. COME. "The Norris-LaGuardia Act in the Constitution." *George Washington Law Review*, Vol. 11, No. 4 (June 1943), p. 399.
SCHLUSSELBERG, IRA. "The Free Speech Safeguard for Labor Picketing." *Kentucky Law Journal*, Vol. 33, No. 4 (May 1945), p. 256, and Vol. 34, No. 1 (November 1945), p. 3.
SCHUYLER, PHILIP. "2 Civil Liberties Champions Clash on Press Freedom." *Editor & Publisher*, Vol. 77, No. 50 (December 9, 1944), p. 7.
SHIENTAG, BERNARD L. "From Seditious Libel to Freedom of the Press." *Brooklyn Law Review*, Vol. 11, No. 2 (April 1942), p. 125.
SNYDER, ORVILLE CAIN. "Freedom of the Press—Personal Liberty or Property Liberty?" *Boston University Law Review*, Vol. 20, No. 1 (January 1940), p. 1.
TAYLOR, KEN. "Thomas Mann Warns America to Guard Press Freedom." *Editor & Publisher*. Vol. 73, No. 39 (September 28, 1940), p. xiii.
TELLER, LUDWIG. "Picketing and Free Speech." *Harvard Law Review*, Vol. 56, No. 2 (October 1942), p. 180.
———. "Picketing and Free Speech: A Reply." *Harvard Law Review*, Vol. 56, No. 4 (January 1943), p. 532.
WAITE, EDWARD F. "The Debt of Constitutional Law to Jehovah's Witnesses." *Minnesota Law Review*, Vol. 28, No. 4 (March 1944), p. 209.
WARREN, CHARLES. "The New 'Liberty' under the Fourteenth Amendment." *Harvard Law Review*, Vol. 39, No. 4 (February 1926), p. 431.
WITMER, T. RICHARD. "Civil Liberties and the Trade Union." *Yale Law Journal*, Vol. 50, No. 4 (February 1941), p. 621.
WYCKOFF, STEPHEN. "Mr. Justice Edmonds and Some Recent Trends in Civil Liberties Law in California." *Bill of Rights Review*, Vol. 2, No. 4 (Summer 1942), p. 269.

Selected Cases in State and Federal Courts

Abrams v. *United States*, 250 U.S. 616 (1919).
Associated Press v. *National Labor Relations Board*, 301 U.S. 103 (1937).

Associated Press v. *United States; Tribune Co.* v. *United States; United States* v. *Associated Press*, 65 Sup. Ct. 1416 (1945), 326 U.S. 1.
Bridges v. *California*, 314 U.S. 252 (1941).
Cantwell v. *Connecticut*, 310 U.S. 296 (1940).
Carpenters and Joiners Union of America v. *Ritter's Cafe*, 315 U.S. 722 (1942).
City of Tampa v. *Tampa Times Co.*, 15 So. 2d 613 (1943).
Cox v. *New Hampshire*, 312 U.S. 569 (1941).
Craig v. *Harney*, 67 Sup. Ct. 1249 (1947).
Debs v. *United States*, 249 U.S. 211 (1919).
Reuben H. Donnelley Corp. v. *City of Bellevue*, 140 S.W. 2d 1024 (1940).
Douglas v. *City of Jeannette*, 319 U.S. 157 (1943).
Fleming v. *Lowell Sun Co.*, 36 F. Supp. 320 (1940).
Gitlow v. *New York*, 268 U.S. 652 (1925).
Grosjean v. *American Press Co., Inc.*, 297 U.S. 233 (1936).
Hague v. *Committee for Industrial Organization*, 307 U.S. 496 (1939).
Hannegan v. *Esquire*, 327 U.S. 146 (1946).
Harper v. *Brennan*, 18 N.W. 2d 905 (1945).
Hill v. *State of Florida ex rel. Watson*, 325 U.S. 538 (1945).
Ex parte Jackson, 96 U.S. 727 (1877).
Jones v. *Opelika*, 319 U.S. 103 (1943).
Lewis Publishing Co. v. *Morgan*, 229 U.S. 288 (1913).
Lovell v. *City of Griffin*, 303 U.S. 444 (1938).
Mabee v. *White Plains Publishing Co.*, 327 U.S. 178 (1946).
Martin v. *City of Struthers*, 319 U.S. 141 (1943).
Masses Publishing Co. v. *Patten*, 244 F. 535 (1917).
Milk Wagon Drivers Union of Chicago v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941).
Murdock v. *Pennsylvania*, 319 U.S. 105 (1943).
National Broadcasting Co., Inc. v. *United States*, 319 U.S. 190 (1943).
National Labor Relations Board v. *A. S. Abell Co.*, 97 F. 2d 951 (1938).
National Labor Relations Board v. *J. L. Brandeis & Sons*, 145 F. 2d 556 (1944).
National Labor Relations Board v. *Clarksburg Publishing Co.*, 120 F. 2d 976 (1941).
National Labor Relations Board v. *Ford Motor Co.*, 114 F. 2d 905 (1940).
National Labor Relations Board v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944).
National Labor Relations Board v. *New Era Die Co., Inc.*, 118 F. 2d 500 (1941).
National Labor Relations Board v. *Virginia Electric and Power Co.*, 314 U.S. 469 (1941).
Near v. *Minnesota*, 283 U.S. 697 (1931).
Nye v. *United States*, 313 U.S. 331 (1941).
Oklahoma Press Publishing Co. v. *Walling; News Printing Co.* v. *Walling*, 327 U.S. 186 (1946).
Patterson v. *Colorado*, 205 U.S. 454 (1907).
J. D. Pennekamp and Miami Herald Publishing Co. v. *Florida*, 328 U.S. 331 (1946); 22 So. 2d 875 (1945).
Powe v. *United States*, 109 F. 2d 147 (1940).
Press Co. v. *National Labor Relations Board*, 118 F. 2d 937 (1940).
San Francisco Shopping News Co. v. *City of South San Francisco*, 69 F. 2d 879 (1934).
Schenck v. *United States*, 249 U.S. 47 (1919).
Schneider v. *State*, 308 U.S. 147 (1939).
Senn v. *Tile Layers Union*, 301 U.S. 468 (1937).
Shively v. *Garage Employees Local*, 108 P. 2d 354 (1941).
State v. *Van Daalan*, 11 N.W. 2d 523 (1943).
Sun Publishing Co. v. *Walling*, 140 F. 2d 445 (1944).
Thomas v. *Collins*, 323 U.S. 516 (1944).
Thornhill v. *Alabama*, 310 U.S. 88 (1940).
Toledo Newspaper Co. v. *United States*, 247 U.S. 402 (1918).
United States ex rel. Milwaukee Social Democratic Publishing Co. v. *Burleson*, 255 U.S 407 (1921).
United States v. *Associated Press*, 52 F. Supp. 362 (1943).
Valentine v. *Chrestensen*, 316 U.S. 52 (1942).
Walling v. *News Printing Co., Inc.*, 148 F. 2d 57 (1945).
Walling v. *Sun Publishing Co.*, 47 F. Supp. 180 (1942).

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